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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,
versus
GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

Decided and Filed January 31, 1992

Before: JONES, Circuit Judge, PECK, Senior Circuit Judge, and DOWD, District Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court in which JONES, Circuit Judge, joined, DOWD, District Judge, dissented.

PECK, Senior Circuit Judge. This three-judge district court was convened to hear Plaintiffs' constitutional and statutory challenges to the 1991 Apportionment Plan for the Ohio General Assembly (the Plan). Plaintiff Barney Quilter, a state representative and designee of the Speaker of the Ohio House of Representatives, and Plaintiff Thomas Ferguson, Ohio's Auditor, were the Democratic members of the 1991 Apportionment Board (the Board). The remaining Plaintiffs are Democratic electors and state legislators, some of whom are members of a protected class under the Voting Rights Act. Plain-

tiffs allege that the Plan impermissibly uses race to draw districts and dilutes minority voting strength in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the fourteenth and fifteenth amendments to the United States Constitution. Additionally, Plaintiffs assert a pendant state claim that the Plan violates Article XI the Ohio Constitution which provides specific apportionment guidelines.

Defendants George Voinovich, Governor of the State of Ohio, Robert Taft, II, Ohio's Secretary of State, and Stanley Aronoff, President of the Ohio Senate, were the Republican members of the 1991 Apportionment Board. Defendant James Tilling drafted the Plan. Defendants contend that the Voting Rights Act, as amended in 1982, and federal case law required that, wherever possible, they create majority-minority districts, *i.e.*, legislative districts in which members of a minority group comprise the majorty.

For reasons which more fully appear hereinafter, we conclude that the Voting Rights Act and federal precedent do not dictate such a *per se* requirement. While creation of such districts may be an appropriate remedy under certain circumstances, Defendants here failed to make the requisite findings which demonstrate a violation of the Voting Rights Act, thereby permiting such a remedy.

APPLICABLE LAW

In order to understand the rationale by which the Plan was developed, it is necessary to review § 2 of the Voting Rights Act, as amended, and *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991). In 1982, the Voting Rights Act was amended. The legislative history of the amendment stated that its purpose was "to prohibit any voting practice[] or procedure [that] results in discrimination" and "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982).

Section 2 of the Voting Rights Act, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973(f)(2)], as provided in subsection (b).
>
> (b A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Thus, the statute does not focus on the purpose or motivation behind the challenged practice or procedure, but the *results* of such practice or procedure. A violation is to be determined by a review of the totality of the circumstances.

The following is a nonexhaustive list of factors relevant to a totality of the circumstances assessment that may be used to establish an unequal opportunity to participate in the political process and elect a candidate of choice:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process (footnote omitted);
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction (footnote omitted).

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982). Additional factors that could have probative value in establishing a violation are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group (footnote omitted).

> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous (footnote omitted).

Id. at 29.

The Senate Committee noted that 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* Whether a § 2 violation has occurred is "based on the totality of the circumstances and guided by those relevant factors in the particular case. . . ." *Id.* at 29 n.118. The ultimate "question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.* at 30.

One month before the Board published the Plan challenged here, the *Armour* court filed its decision. In *Armour*, the plaintiffs alleged that a voting district boundary in Mahoning County drawn under the 1981 apportionment plan which split a large, cohesive Black population between two districts deliberately and effectively diluted the minority vote in violation of § 2 of the Voting Rights Act and the fifteenth amendment. The *Armour* court conducted a "searching practical investigation of the past and present reality" in Mahoning County by applying the totality of the circumstances factors and concluded that the boundary was indeed violative of § 2 of the Voting Rights Act and the fifteenth amendment. Significantly, the Black population divided by the illegal boundary was not large enough to form the majority of a single-member district. Thus, the court in *Armour* recognized that a cohesive group of minority voters could *influence* an election even though they did not comprise a majority in the district. *Armour*, 775 F. Supp. 1052, 1059-60.

FACTUAL BACKGROUND

Under the Ohio Constitution, beginning in 1971 and every tenth year thereafter, a five-member apportionment board is to assemble and publish an apportionment plan for the General Assembly. Ohio Const. art. XI, § 1. In accordance with this provision, an apportionment plan was published and became effective in 1981, prior to the 1982 amendment of the Voting Rights Act. Tilling, as author of the 1991 Plan, testified that he tried "to make the necessary changes to bring this current apportionment plan into conformity with the 1982 amendments." (Tilling Dep., Vol. I, at 168). During the end of August 1991 and the beginning of September 1991, Tilling conducted fourteen public meetings throughout Ohio for the purpose of obtaining public comment and minority input on the 1991 Plan.

In his comments at these public hearings, Tilling repeatedly stated that his interpretation of the Voting Rights Act and related federal case law required the creation of a majority-minority district wherever possible. Joint Trial Exhibits, *passim*. For example, at the public hearing in Columbus, Ohio, on August 27, 1991, Tilling stated that to comply with United States Supreme Court guidelines, the Apportionment Board was "under a mandate that wherever a majority-minority district can be created, that must be done." Joint Trial Exhibits, Tab 2, at 12. Tilling also stated that the Board needed to "establish for the record the totality of the circumstances in each urban area" to comply with the Voting Rights Act and the recent decision in *Armour*, *supra*. (Joint Trial Exhibits, Tab 13, at 33). Black community leaders and other interested persons spoke at the public meetings. The Plan was adopted by the Republican majority on the Board on October 1, 1991, amended on October 3, and published on October 5. Plaintiffs Quilter and Ferguson dissented.

In this action, Plaintiffs allege that under the guise of protecting minority rights by creating majority-minority districts, Defendants have actually packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes. Plaintiffs contend that the packing results in wasting minority votes in the packed districts and diluting minority voting strength in surrounding areas where the "packed" voters could possibly influence elections. Specifically, Plaintiffs allege minority vote dilution resulting from the revision of nine districts which have been represented by either a minority legislator or a white legislator with a 90% to 100% voting record on bills related to minority issues.

With regard to the black legislators, each has been elected to between six and thirteen terms. For the elections between 1984 and 1990, each was elected with an average plurality ranging between 68.27% and 72.64%. Under the 1981 apportionment plan, the black population in their districts ranged from 38.5% to 53.19%. Under the 1991 Plan, the black population in each district was increased between 7.7% and 13.68%. Plaintiffs assert that these increases impermissibly pack black voters in districts where their votes are wasted because there exists substantial crossover voting which allows blacks to elect candidates of choice. Plaintiffs also allege that where these districts were revised, segments of the former district having small minority populations were combined with other districts resulting in the fragmentation and dilution of minority voting strength. Similarly, Plaintiffs allege that the districts represented by the white legislators with responsive voting records on black issues were divided so that portions of the black population were packed into districts with a high percentage of black population or fragmented into districts with such a small percentage of black population that the minority voting strength would be diminished. As justification for these configurations, Defendants assert that the Voting Rights

Act and federal case law mandate the drawing of majority-minority districts. We cannot agree.

ANALYSIS

A. Justification for majority-minority districts

The language of § 2 of the Voting Rights Act contains no requirement for majority-minority districts. Rather it prohibits *any* "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." It is directed against certain *results*, regardless of how they are produced. Thus, where the creation of majority-minority districts wastes minority votes by packing and dilutes minority influence by fragmenting, the result is an "abridgement of the right . . . to vote on account of race or color" which violates the Voting Rights Act. The United States Supreme Court has recognized this principle:

> Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. (Citations omitted).

Thornburg v. Gingles, 478 U.S. 30, 46 n. 11 (1986).

Thus, we can find no *per se* requirement for the creation of majority-minority districts in § 2 of the Voting Rights Act.

Tilling also makes reference to *Gingles*, *supra*, in justifying his configuration of districts. In *Gingles*, the United States Supreme Court considered a challenge under § 2 of the Voting Rights Act to North Carolina's multimember districting scheme. The Court set forth three preconditions to a § 2 challenge alleging that multimember districts impair minority voters' ability to elect representatives of their choice:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51 (emphasis in original) (footnotes and citations omitted).

Apparently, Tilling read the first precondition to require the creation of majority-minority districts wherever possible. However, the Supreme Court in *Gingles* limited these preconditions to challenges to multimember districts:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim

> that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Id. at 46 n. 12.

Thus, *Gingles*' preconditions are not applicable to the apportionment of single-member districts and claims of dilution of minority influence districts at issue here. *Accord*, *Armour*, 775 F. Supp. at 1052. Therefore, we can find nothing in *Gingles* which establishes a *per se* requirement for the creation of majority-minority districts.

Finally, Defendants suggest that *Armour*, *supra*, mandates the creation of majority-minority districts. It is true that the court in *Armour* concluded that the division of a cohesive concentration of Black voters between two districts in Mahoning County was violative of § 2 of the Voting Rights Act and the fifteenth amendment. These determinations were made after the court conducted a detailed examination of the totality of the circumstances factors outlined in the legislative history with regard to Mahoning County and Youngstown. While the aggregation of Black voters into one district is an appropriate remedy under certain circumstances, *Armour* does not stand for the proposition that persons responsible for apportionment should create majority-minority districts wherever possible. Thus, we conclude that nothing in § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour*, *supra*, mandates the drawing of majority-minority districts wherever there is a concentration of Black voters.

B. Inadequacy of Defendants' totality of circumstances analysis

In addition to Tilling's contention that federal statute and case law mandated the creation of majority-minority districts, he justified the Plan by stating that revised districts were necessary "to bring [the 1981] apportionment plan into conformity with the 1982 amendments." Tilling Dep., Vol. 1, at 168. Thus, in essence, Tilling is asserting that the majority-minority configuration was necessary to remedy violations of the Voting Rights Act under the 1981 plan. However, violations of the Voting Rights Act are not to be assumed. The finding of a violation requires an in-depth analysis of the totality of the circumstances in the locality at issue. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982); *Armour*, 775 F. Supp. at 1053 (our inquiry does not focus on the black experience in the entire state but rather on the political and social reality local to the Mahoning Valley). Although Tilling stated that one of the reasons for the public hearings was to "establish for the record the totality of the circumstances in each urban area . . ." Joint Trial Exhibits, Tab 13, at 33, we find the information in the record grossly inadequate in this regard.

Key determinations in a totality of the circumstances analysis are whether racially polarized voting exists and the closely related issue of the extent to which minority candidates are elected in the jurisdiction. *Gingles*, 478 U.S. at 55. The Supreme Court in *Gingles* provided guidance on determining the whether racially polarized voting[1] is present in a case. The Court noted that the district court relied principally on expert statistical evidence derived through extreme case analysis and bivariate ecological regression analysis on data from three different election years in the challenged districts. *Id.* at 52-53.

[1] The Supreme Court used the terms "racially polarized voting" and "racial bloc voting" interchangeably in *Gingles*. 478 U.S. at 52, n. 18. The terms are also used interchangeably here.

These methods are standard in the literature for the analysis of racially polarized voting. *Id.* at 53, n. 20. The degree of bloc voting which constitutes the threshold of legal significance varies from district to district. *Id.* at 55-56. However, a showing that a significant number of minority group members vote for the same candidates can establish minority bloc voting within the context of § 2. *Id.* at 56. Generally, white voting patterns that normally will defeat the combined strength of minority support and white "crossover" votes is legally significant white bloc voting. *Id.*

In the present case, Tilling "concluded that there was significant racial bloc voting throughout the State of Ohio. . . ." Tilling Dep., Def. Exh. 96; at 93. However, Tilling arrived at this conclusion without the benefit of regression analysis. *Id* at 92. Instead, Tilling examined the votes for the minority representatives to the General Assembly in past elections to try to ascertain racial patterns of voting. Tilling Dep., Vol. I, at 37-39. Tilling admits that he did the analysis using 1990 census data which does not correspond directly to the 1981 districts. *Id.* at 38. Tilling did not reduce his calculations or conclusions to writing. *Id.* at 39. Tilling also examined the results of the primary in which Jesse Jackson ran. Tilling Dep., Vol. II, at 6. Again, he did not subject the data to any statistical analysis. *Id.* at 9.

Tilling further contended that racial bloc voting existed in the districts in which black legislators were being elected with white crossover votes from districts with less than a majority of black voters. Tilling Dep., Vol. I, at 39. When asked specifically if the racial bloc voting in these districts was legally significant, Tilling could not give an unequivocal answer, stating merely that "given the opportunity there is a much higher percentage of black vote for black candidates than white vote for black candidates." *Id.* at 40-41. However, Tilling acknowledged that blacks were elected from districts with as

low as 35% black population. *Id.* at 177-78. Ultimately, Tilling increased the black voters in these districts despite the successful election of black legislators with substantial crossover white vote.

It is disturbing that Tilling based his conclusions that there was racial bloc voting and subsequent revisions in the apportionment of voters on such a casual analysis of voting returns. He did not subject his data to statistical analysis or even memorialize his calculations and "findings" in writing. Given the guidance of the Supreme Court in *Gingles* with regard to legally significant racially polarized voting, we conclude that Tilling's analysis does not rise to the level of proof of racially polarized voting.

Another relevant factor is whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the minority community. However, Tilling stated that he did not examine the voting record of any single respresentative to determine his responsiveness to the minority community. *Id.* at 185. Tilling's information on this factor involved his review of legislators' voting records in preparation for previous Senate campaigns. *Id.* at 179-181. He observed that the information was "part of my mental equipment as I began this process." *Id.* at 180-81.

Review of social and historical factors are also appropriate under a totality of the circumstances review. However, Tilling admitted that he did no studies of the communities at issue except to hold the public hearings. Tilling Dep., Vol. II, at 39. While a few relevant items can be sifted from the voluminous transcripts of the public meetings, there is a paucity of information on these factors in the record. Of the information available, much is anecdotal and seems to be culled from Tilling's personal experience rather than from community sources. For example, when deposed on factors he took into account in his totality of the circumstances analysis, Tilling stated that "in the course of my years in the Senate I have had

occasion to talk to many of the minority representatives about various practices that have influenced their ability to fully participate in the process. . . ." Tilling Deposition, Def. Exh. 96, at 97-98. With respect to discrimination in education, Tilling stated that he had spent a year in the late 70's on the Ohio General Assembly's Joint Select Committee on School Desegregation and noted that schools in several of the urban areas in Ohio are under desegregation orders. *Id.* at 97. Tilling also testified that he was aware of the differences in employment figures for minorities and whites in Ohio. *Id.* While Tilling's input on some of these issues could be useful in a totality of the circumstances review, we find that it, even in combination with a series of public meeting compressed into a two and a half week period, falls far short of the "searching practical evaluation of past and present reality" mandated by the legislative history.

Accordingly, we find that no adequate totality of the circumstances analysis was performed by the Board. In the absence of such an analysis, there can be no reliable finding of a violation. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.

CONCLUSION

For the foregoing reasons, we conclude that there is no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 Apportionment Plan. Accordingly, the Board is ORDERED to reconsider the Plan. Unless it can show justification under the totality of the circumstances test for the present configuration, the Board must submit a revised plan to this

court within 20 days of the date of this order. In the event that a revised plan is not received by this court within the time limit, further action will be taken by this court *sua sponte*.

Because our analysis under the Voting Rights Act requires the Plan to be revised, we decline to address Plaintiffs' claims under the United States Constitution at this time. This is consistent with the judicial preference for deciding cases without reference to questions arising under the Federal Constitution whenever possible. *Hagans v. Lavine*, 415 U.S. 528, 546 (1974) (citing *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1909)).

With regard to Plaintiffs' claims under the Ohio Constitution, we note that these claims are before the Ohio Supreme Court in the case of *Ferguson v. Voinovich*, No. 91-1882. While this court is not required to abstain from these issues, *Davis v. Mann*, 377 U.S. 678, 690 (1964), where parallel litigation is instituted in the state and federal courts, it is appropriate for the federal courts to deal with the federal issues and leave the state issues to the state court. We do note, however, that the Board majority claims adherence to the alleged federal mandate to create majority-minority districts wherever possible. Given that we now hold that there is no such mandate, we remove this as a possible defense in any subsequent or concurrent state proceedings.[2]

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[2] The exigencies of the situation, which include satisfying deadlines, have required counsel for the parties to formulate and present their positions with commendable speed, and have similarly imposed upon this panel a mandate to record the conclusions reached as rapidly as possible. The opportunity of offering an analysis in depth of the thoughtful dissent (which, in fact, we have only seen in outline form) not being available, we refrain from offering a detailed reaction, observing simply that in our view such an analysis only becomes appropriate after an apoprtionment plan has been shown

to have been prepared according to law. The present record is devoid of such a showing.

Some response might, however, be helpful to the parties. First, we must caution against accepting some of the characterizations of the majority opinion by the dissent. For example, it observes, "My colleagues have ruled that the 1991 reapportionment of Ohio for the purposes of electing the Ohio General Assembly violates § 2 of the Voting Rights Act because the majority members of the apportionment created additional majority-minority voting districts in Ohio . . . ." The dissent goes on to state, "Presumably, the Court holds that increasing the minority population in a district where a minority group is already able to elect a minority representative is *per se* packing and wasting minority votes." The dissent further observes that "the majority apparently holds that the districts must be drawn in such a way that the black vote is *maximized*." We made no such holdings. The thrust of the opinion is not to outlaw majority-minority districts nor to create "a favored race for voting purposes," as the dissent suggests. Rather, the guiding lights are that there is no legal mandate under § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour*, *supra*, to create majority-minority districts wherever possible. Furthermore, in the absence of a reliable finding of a violation of the Voting Rights Act, it cannot be used as justification for the wholesale creation of majority-minority districts. This highlights the divergent directions from which the majority opinion and dissent proceed. The dissent focuses only on the untested end result, whereas the majorty opinion recognizes the vital importance of the process and the pitfalls which arise from a *per se* application of majority-minority districting, *i.e.*, minority vote dilution can result from the concentration of minorities in districts.

Proceeding from their respective approaches, the narrow holding of the majority opinion requires the resubmission of a plan properly premised, while the dissent would put this court in the position of a super-apportionment board—a status which on the basis of abundant authority we decline to occupy. Unlike the dissent, we purposely have not compared and contrasted the plan submitted by the Plaintiffs to the plan adopted by the majority of the Board. The function of this court at this stage of the proceedings is not to choose between two plans, but to measure the plan as adopted against federal law. As stated above, federal law cannot serve as the justification for the present plan. Unless, the Board can show such justification, it must proceed to develop a revised plan which complies with federal and state constitutional law.

DOWD, J., dissenting:

This case brings together a number of developments in Ohio political life. They include Ohio's attempt by way of constitutional provisions to comply with the one man-one vote mandate of *Baker v. Carr*, 369 U.S. 186 (1962), the ten year requirement [1] to reapportion [2] the Ohio General Assembly, a change in the demographics in Ohio, including a southward and westward shift in population, the change in the political control of the Ohio Apportionment Board from the Democratic Party to the Republican Party, the impact of the Voting Rights Act as amended in 1982, 42 U.S.C. § 1973, the recognition by both the Republican and Democratic members of the Apportionment Board of the desirability of creating more majority-minority legislative districts in Ohio, and the decision in the *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) case.

This case, filed on November 1, 1991, required the creation of a three judge panel and, in the context of the remedy sought by the Plaintiffs, prompt action in view of the filing deadline of February 20, 1992 for candidates seeking election to the Ohio General Assembly in the general election in November of 1992.[3]

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[1] Ohio Constitution, Article XI, § 1.

[2] The words "apportion" and "reapportion" are used interchangeably in the case law. For purposes of my dissent I have used the word apportion as it is used in the Ohio Constitution even though this case involves the reapportionment of the State of Ohio.

[3] Ohio conducts a primary election in May in the two major political parties and candidates wishing to run as either the Democratic or Republican candidate must declare by February 20, 1992. Candidates wishing to run as independents face more stringent requirements in terms of the number of persons who must sign the candidacy petition, but the petitions themselves need not be filed until after the May primary has been conducted.

The three judge panel, mindful of the time constraints, has endeavored to expedite the fact finding process and render a decision so as to avoid uncertainty about the mechanics of the 1992 election for the Ohio General Assembly.[4]

The central feature in this highly charged political controversy that typically accompanies the apportionment of a state for the purposes of electing the state's legislative body is the question of whether the apportionment process should include recognition and consideration of the provisions of Section 2 of the Voting Rights Act. The Defendants answer that question in the affirmative and declare that the complicated procedure of apportionment of necessity included consideration of how to structure the 99 house districts in the urban counties of Ohio where the largest minority populations are located. The position of the Plaintiffs which include the two Democratic members of the apportionment board is less apparent. The Plaintiffs contend that the Apportionment Board did not make any fact findings that support its decision to create additional majority-minority districts and claim the creation of the additional majority-minority districts was contrary to law in the absence of such fact findings in the context of the "totality of the circumstances" test set forth in the legislative history that accompanied the adoption of the 1982 amendment to the Voting Rights Act and which gained additional recognition in the plurality opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The Plaintiffs additionally claim the number of black voters was increased in a number of districts, contrary to law because the district was already represented by a black incumbent and thus the addition of the black voters constituted "packing" or

---

[4] The Court granted the parties in this case three hours apiece to present their testimony. That procedure was completed on December 17, 1991. Thereafter, counsel filed proposed fact findings on December 30, 1991 and briefs on the merits on January 6, 1992.

"wasting" of those black voters. The Plaintiffs also claim, based on a study done with reference to the 1990 Ohio elections, that the number of "influence" districts have been decreased and that such a decrease involves a violation of the Voting Rights Act. In sum the Plaintiffs-Democrats contend that the Defendants-Republicans violated the Voting Rights Act by creating additional majority-minority voting districts in Ohio and also violated the Voting Rights Act by decreasing the number of "influence" districts.

Additionally, Plaintiffs claim that the 1991 apportionment plan violates the due process provisions of the fourteenth amendment because the 1991 plan constituted partisan gerrymandering. The partisan gerrymandering claim fails for two reasons. First, I find an absence of proof. More importantly, in the absence of an actual election conducted under the 1991 plan, the issue of partisan gerrymandering is premature. *Davis v. Bandamer*, 478 U.S. 109 (1986).

The Plaintiffs also allege that the Defendants intentionally violated the fifteenth amendment. My colleagues have not addressed the constitutional claims because of the determination that the 1991 apportionment plan violates the Voting Rights Act. Again, I find a total absence of proof of an intentional violation of the fifteenth amendment.

My colleagues have ruled that the 1991 apportionment of Ohio for the purposes of electing the Ohio General Assembly violates § 2 of the Voting Rights Act because the majority members of the apportionment board created additional majority-minority voting districts in Ohio, and have ordered the five members of the apportionment board to revise the plan within 20 days without giving any accurate guidance as to how that process is to be accomplished within the structures of the Ohio constitution or for that matter within the mandates of the Voting Rights Act.

The majority opinion provides a very limited factual background critical to a proper analysis of this case. I am of the opinion that in evaluating an apportionment plan, the district court should be careful to make "detailed findings of facts . . ." both to insure a proper analysis of the plan at the district court level and to assist the Supreme Court should appellate review become necessary. *Westwego Citizens for a Better Government v. Westwego*, 872 F.2d 1201, (5th Cir. 1989). If one of my fellow judges on this panel had agreed with my position and I had the opportunity to write the Court's opinion, I would have made the fact findings that are attached as Appendix 2 to this dissent. From those fact findings I have distilled a summary of major fact findings which are hereafter incorporated in the body of this dissent.[5]

Article XI of the Ohio Constitution provides a detailed plan for the decennial apportionment of the Ohio General Assembly. The detailed plan calls for the creation of ninety nine separate single member districts for the Ohio House of Representatives and thirty three single member seats in the Ohio Senate. Appendix 1 is a study of the eighty eight Ohio counties setting forth the number of lower house districts allocated on a county by county basis with an indication of the total population and black population of the eighty eight counties.

Bernard Grofman, recognized as a national expert[6] on apportionment issues as they relate to minority interests, has declared in a recent publication, Bernard Grofman, *Voting Rights, Voting Wrongs; The Legacy of Baker v. Carr*, 1990 TWENTIETH CENTURY F. PAPER. 31:

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[5] A summary of these fidings can be found later in the dissent.

[6] Writing for the Court in *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986), Justice Brennan indicated that he "relied principally on statistical evidence presented by . . . Dr. Bernard Grofman." Justice Brennan also cited numerous articles written by Dr. Grofman on the issue of apportionment. *Id.* at 47, 53.

> One approach to eliminating or reducing gerrymandering is through statutory or state constitutional provisions that strictly implement formal criteria such as compactness, equal population, and maintenance of the integrity of political subunits.

My study of the 1991 apportionment process for Ohio in the context of the Ohio Constitutional provisions indicates that the Ohio Constitution and the process for the 1991 apportionment is a mirror of Grofman's recommended approach.

SUMMARY OF MAJOR FACT FINDINGS

In the interest of brevity and convenience, I have highlighted the fact findings that I submit are most critical to a proper analysis of this case.

1. Article XI of the Ohio Constitution controls the apportionment process for the legislative body for Ohio, the General Assembly, and mandates 99 single member districts for the House of Representatives and a 33 member Senate comprised of three contiguous House Districts.

2. The apportionment process takes place in Ohio every ten years in the year in the decade ending in the number 1 and in reliance on the most recent federal decennial census information. The 1991 apportionment plan for the Ohio General Assembly relies on the 1990 census data.

3. The Ohio Constitution requires that the apportionment process be accomplished on a county by county basis and requires compact districts. Ohio has 88 counties. The first requirement in the apportionment process is to determine the ideal number for a district by dividing the entire state population by 99 and for 1991 this process produced an ideal number of 109,567. Next, single member county districts are mandated in the event the county's total population is with 5% of the ideal number. Four Ohio counties, Warren, Wood, Allen and Columbiana, fell within that computation for 1991. The apportionment board may also create single member dis-

tricts for counties with a total population that is within 10% of the ideal number. The 1991 plan includes in that latter category an additional three counties, Fairfield, Wayne and Ashtabula. Next, the apportionment board is directed to create districts beginning with the most populous counties with the mandate that where a county has population in excess of the number needed for a single member district, that only one district within the county that is entitled to more than one district may spill over ino an adjoining county or counties. By way of example, Cuyahoga County, the most populous county, is entitled to 12.88 districts. Twelve of the districts must be contained wholly within Cuyahoga County and the 13th district will, of necessity, "spillover" into an adjoining county. Twenty six Ohio counties are entitled to at least one district within the county. The remaining 62 counties have a population less than 90% of the ideal number for a district and therefore must be combined with other counties to create a house district.[7]

4. The apportioning process for the Ohio General Assembly is done by two persons appointed from the Ohio General Assembly with each of the two major political parties represented. The remaining three are the elected governor, auditor of state, and secretary of state. In 1971 and 1981, the apportioning process was controlled by a majority from the Democratic party and in 1991 by a majority from the Republican party.

5. In addition to the Ohio constitutional provisions that control apportionment, Section 2 of the Voting Rights Act as amended in 1982 and recently interpreted in the *Armour* case that struck down the 1981 apportionment as it related to Mahoning County, was considered by the members of the apportioning board in 1991.

6. The black minority population in Ohio is predominantly located in its six major urban counties of Cuyahoga

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[7] *See* Appendix 1.

(24.9%), Franklin (15.9%), Hamilton (10.9%), Montgomery (17.7%), Summit (11.9%) and Lucas (14.8%). Those six counties account for approximately forty four of the ninety nine house districts and are presently represented by 11 minority representatives even though the total black population of the six counties (according to 1990 census figures) is only 19.1% of the total population of the six counties, i.e., 915,628 of a total population of 4,790,965.

As indicated in the 1990 census, the total population of Ohio is in excess of 10 million people, and with only a modest change from the 1980 census. Ohio experienced a net gain in population of approximately 50,000 people. However, there were significant population shifts within the state. Specifically, there occurred a substantial shift in population from the Northeast quadrant of the state to the Central and Southwest portions of the state, particularly to Franklin, Delaware, Union and Madison counties. There also occurred a population shift from Cincinnati and Hamilton County to Butler, Clermont and Warren counties. Cuyahoga County lost one entire house district in population (109,000 people) while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous county in the state. There were also significant population shifts from the inner cities to the suburbs.[8]

7. As a result of major population shifts within counties and from the inner city to the suburbs, the majority of the 1981 configured districts in the six major urban counties had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution.[9]

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[8] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 61-63.

[9] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 79-80.

8. By way of summary, the 1991 Apportionment Plan creates four (4) majority-minority districts in Cuyahoga County with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with a black population of 74.80%, 90.05%, and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%.[10]

The 1991 Apportionment Plan also creates a strong influence district to Cuyahoga County of 40.61% compared to an influence district of only 26.46% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.[11]

The 1991 Apportionment Plan has one (1) majority-minority district in Franklin County at 50.30% black voting age population where none existed in the 1980 apportionment. The 1991 Apportionment Plan also has a strong influence district at 44.31%. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs' Ferguson and Quilter also has one (1) majority-minority district at 50.60% black voting age population and one influence district at 46.40% Significantly, part of the rationale in the 1991 Apportionment Plan for increasing relative black percentages in Franklin County house districts from the 1981 plan was to create a Senate influence district in Franklin County.[12]

The 1991 Apportionment Plan creates two (2) majority-minority districts in Hamilton County where only one existed in the 1981 apportionment. The majority-minority districts in the 1991 Apportionment Plan have

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[10] *See* Defendants' Exhibit 77.

[11] Defendants' Exhibit 77.

[12] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 103-104.

black voting age populations of 52.60% and 56.83%. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also reflects one (1) majority-minority district at 57.91%. The 1991 Apportionment Plan also reflects an influence district of 21.58% compared to 19.55% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

The 1991 Apportionment Plan reflects one (1) majority-minority district in Montgomery County, where none existed in the 1981 apportionment. The 1991 Apportionment Plan has a district with a black voting age population of 50.70% and an influence district at 29.23%. By way of comparison, the plan presented by Plaintiffs Ferguson and Quilter has no majority-minority districts and two influence districts at 36.20% and 45.26%. Plaintiffs challenge no districts in Montgomery County.

The 1991 Apportionment Plan reflects a slight increase in black population in House District 42, in Summit County, currently represented by minority incumbent Representative Sykes. The increase is from 35.40% to 43.26% black population. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also increases the black population in Representative Sykes' district from 35.40% to 47.20%. Plaintiffs challenge no districts in Summit County.

The 1991 Apportionment Plan reflects an increase in black population in House District 45, in Lucas County, which is comparable to the district currently represented by minority incumbent Representative Casey Jones. The black voting age population in Jones' district was increased to 47.65% compared to 44.98% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. The black populations in House Districts 45 and 47 in the 1991 Apportionment Plan are substantially similar to the 1991 Apportionment Plan proposed by Plaintiffs Ferguson and Quilter.

In Stark County, there is not sufficient black population to form a majority-minority district.

The districts in Mahoning County are configured pursuant to the order of the Federal District Court in *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991).

Overall, there are eight (8) majority-minority districts in the 1991 Apportionment Plan compared to only four (4) in the 1981 apportionment and six (6) in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

In the 1991 Apportionment Plan, there are twenty (20) districts with over 10% black voting age population, which is the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

9. In drafting the 1991 Plan, Mr. Tilling worked closely with the leaders of various minority groups in Ohio. Further, minority groups had substantial input in the creation of the final plan that was submitted to the state legislature.

10. Proposed apportionment plans were submitted by numerous minority special interest groups. Among those submitted, were the plans from Black Elected Democrats of Ohio (BEDO) and the Ohio Conference of Branches of the NAACP.

On September 30, 1991, the Apportionment Board met to hear testimony from the various proponents of the proposed plans.[13]

On October 1, 1991, the Apportionment Board met again to consider adoption of a final plan of apportionment. The meeting was recessed from time to time to permit discussions among representatives of BEDO and

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[13] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 36-37.

the NAACP and Mr. Tilling to attempt to reach a concensus concerning minority districts.[14]

These discussions were initiated by Mr. Tilling after representatives of BEDO and the NAACP failed to reach a consensus regarding minority districts. Mr. Tilling contacted Congressman Louis Stokes to attempt to bring the minority groups together. Mr. Tilling initiated these discussions since he knew that minority voting issues would be the focal point of the apportionment process.[15]

11. During the public hearing conducted on October 1, 1991, BEDO and the NAACP reached a consensus regarding the establishment of minority districts in Cuyahoga County in the final 1991 apportionment plan. The NAACP accepted BEDO's proposal for Cuyahoga County, establishing four majority-minority districts and one influence district in Cleveland. The NAACP's original plan established five majority-minority districts in Cuyahoga County. The plan orginally submitted by the Board also called for five majority-minority districts in Cuyahoga County.[16]

On October 1, 1991, BEDO offered the consensus position with regard to the districts in Cuyahoga County as an amendment to the BEDO plan (referred to herein as the "BEDO Amendment"). The BEDO Amendment was also offered as an amendment to the plan proposed by the majority of persons responsible for apportionment.[17] The amendment was accepted by the Apportion-

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[14] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38-40.

[15] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38, 39, 42.

[16] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 43.

[17] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 41.

ment Board and incorporated in the final 1991 Apportionment Plan.[18]

12. At the meeting of October 1, 1991, Dana Mattison [19] and Senator Jeff Johnson, a minority Senator from Cuyahoga County, endorsed the BEDO Amendment creating four majority-minority districts. Floyd Johnson, on behalf of the NAACP, endorsed the entire 1991 Apportionment Plan.[20]

The BEDO Amendment was endorsed by William Mallory, President of BEDO and Congressman Stokes.[21]

The Ohio Conference of Branches of the NAACP endorsed the 1991 Apportionment Plan in its entirety.[22]

13. The 1981 apportionment plan for Ohio created 24 districts with a ten percent (10%) or more minority voters. Two of those districts were in Mahoning County and the *Armour* decision required that the two districts be realigned to place all minority voters in one of the two districts. The 1981 apoprtionment plan also created as a part of the 24 districts, four majority-minority districts, three in Cuyahoga County with a percentage of blacks as high as 94.67% and one in Hamilton County with a percentage of black voters fixed at 53.2%. The 1991 apportionment plan created eight majority-minority districts

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[18] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 44.

[19] Dana Mattison is the Executive Director of BEDO. Deposition of Dana Mattison, Defendant's Exhibit 82, sub exhibit C; p. 14.

[20] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 40; Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 83-89; Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 58.

[21] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 89, 90, 91.

[22] Deposiiton of Floyd Johnson, Defendants' Exhibit 97, pp. —.

and the number of districts with at least 10% minority voting population is 20. In sum, the 1991 apportionment plan, in comparison to the 1981 plan, has increased the number of majority-minority districts by four and reduced the number of districts with 10% or more black voters by four. *See* Appendix 1.

History of Apportionment Law

A. *Introduction*

In reviewing an apportionment plan developed by a legislature, a district court is guided by a number of constraints. First, the district court must only determine whether that plan is acceptable under the prevailing law, and not whether another plan would be more advantageous to the parties at interest. *Reynolds v. Simms*, 377 U.S. 533 (1964). Second, deference is to be extended to a apportionment plan advanced by the legislature. *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Texas 1982). It is with these considerations in mind that I evaluate the Plaintiffs' case.

B. *One Man One Vote*

The cases that first spoke to the requirements of apportioned voting districts focused on the ideal that each citizen should have an equal voice in his or her government. The way in which most citizens are heard in their government is through their vote on election day. Thus, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that each citizen's vote must carry the same weight in determining the outcome of a political election. The holding in *Baker* has come to be known as the "one man, one vote" rule, and has been followed ever since. As the Court in *Gaffney v. Cummings*, 412 U.S. 735, 741 (1973) noted:

> 'The requirement of Art. I § 2 of the Constitution, that representatives be chosen 'by the People of the several states,' mandates that one man's vote in a

> congressional election is to be worth as much as another's.'

(*quoting Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

C. *Voting Rights Act § 2*

In order to give effect to the "one man one vote" principle, Congress enacted the Voting Rights Act. 42 U.S.C. § 1973. In 1982, one year after the Democratic party controlled 1981 Apportionment Plan was adopted, § 2 was amended to eliminate the requirement of evidence of invidious, intentional discrimination in order to prove a voting Rights Act violation. In *Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held that disproportionate effect, alone, was insufficient to prove unlawful vote dilution. In response to cases such as *Mobile*, Congress passed in 1982, an amendment to § 2 of the Voting Rights Act that removed the requirement of invidious, intentional discrimination. *Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). As my colleagues point out, the focus now is on the *results* of the apportionment plan.

In evaluating the results of the plan, the court must take into account not only the deviations from the acceptable norm for population distribution, but also the extent of the deviation. Judicial apportionment plans have been held to very high standards, finding that even minor deviations violate the Voting Rights Act. Legislative apportionment plans have been afforded more leeway. Generally, legislative apportionment is guided by the "under 10% deviation" rule, finding that population deviations from the ideal norm that are less than 10% are *de minimis*. *Connor v. Finch*, 431 U.S. 407 (1977); and *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981). *See eg. Gaffney v. Cummings*, 412 U.S. 735 (1973) (7.83% deviation from population norm was acceptable); and *White v. Regester*, 412 U.S. 755 (1973) (9.9% deviation acceptable).

ANALYSIS

Voting Rights Act

The majority begins its analysis of the case by noting that the Plaintiffs have alleged that the 1991 Plan violates the Voting Rights Act by impermissibly considering race in the drawing of district lines, serving to dilute the minority vote in the process. Before focusing on the 1991 Plan, however, the majority turns its attention to the merits of the 1981 Plan.[23]

The majority opinion argues that the 1991 Apportionment Plan must be rejected because the majority board, and namely Mr. Tilling, did not prove that the 1981 Apportionment Plan violated the Voting Rights Act. Specifically, the majority declares that under the totality of the circumstances test, it was not demonstrated that the 1981 plan violated the Voting Rights Act.[24] The majority reasons that absent such a showing, the majority board was not entitled to apportion the state.

The majority opinion appears to declare that the Voting Rights Act requires that there be an established violation before an apportionment board is entitled to apportion a district with a significant black population. This argument places the cart before the horse because the totality of the circumstances test, derived from the Voting Rights Act, is a tool that is to be utilized by the district court in evaluating the *plan before it*, and not as a prerequisite to redistricting.

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[23] My colleagues do address the "process" used by the majority board in arriving at the 1991 plan. A criticism of the "process analysis" will follow.

[24] The majority's conclusion that the 1991 Reapportionment Board was not entitled to reapportion the state is especially remarkable when one considers the fact that one district in Cuyahoga County contained a black population in excess of 94%. Such a figure must be considered packing under any judicial or legislative standard.

In *Reynolds v. Sims*, tne court held that the court's purpose in apportionment cases is not to determine which plan would be most appropriate in terms of fair and equal redistricting, but rather whether the plan before it violates the Voting Rights Act. Since I do not believe that the 1991 Plan violates the Voting Rights Act, I am of the view that it should be implemented.

While the majority opinion does not directly evaluate the 1991 Plan, it does criticize the process used by the majority board in developing the 1991 Plan. The majority opinion claims that Mr. Tilling's recommendation to create majority-minority districts whenever possible was inappropriate and not mandated by the Voting Rights Act. In my view, a § 2 of the Voting Rights Act as amended in 1982 and as interpreted by *Gingles* and *Armour* sends an unambiguous signal that a apportioning process must consider the impact of the apportioning on the minority rights of the voting persons. The majority opinion is ambivalent when one considers the fact that the Plaintiffs Ferguson and Quilter advanced their plan for apportionment which created an additional two majority-minority districts as opposed to the additional four such districts created by the adopted plan.

Rather than focus on the process used by the majority in arriving at the 1991 Plan, I submit that the Court should be concentrating on the result. It is only when the creation of majority-minority districts serves to dilute the minority vote that the Voting Rights Act is violated. The facts do not support the majority's conclusion that the 1991 Plan violates the Voting Rights Act.

The majority's determination that the Defendant members of the majority board have been unable to demonstrate that the Voting Rights Act mandates the redistricting found in the 1991 Plan omits several important observations. The Court completely ignores the fact that there were substantial population shifts in the state of Ohio since 1981. Based on the total population as calcu-

lated by the 1990 census, the ideal district population was 109, 567, and the allowed range was between 104,089 and 115,045. Twenty seven of the forty four districts in the six large urban counties, as defined by the 1981 Apportionment Plan, did not fall within the 5% deviation specified in the Ohio Constitution.[25] Specifically, nine districts in Cuyahoga County, seven districts in Hamilton County, six districts in Franklin County, three districts in Montgomery County, and two districts in Lucas County, had to be reconfigured because of the population shifts subsequent to the 1981 apportionment.

An apportionment board has an obligation to apportion when the districts do not meet the population requirements based on the total population of the state divided by the number of districts designated in the state's constitution. *Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). Left uncorrected, population shifts can, and I believe would in this case, result in a situation where the vote of one individual in one part of the state is of unequal weight as the vote of another individual located elsewhere in the state. That is why in *Garza*, the court held that the legislature has a *duty* to apportion when substantial population shifts occur in order to avoid a Voting Rights Act violation, and that is why I believe that apportionment on a grand scale was warranted and, indeed, necessary in this instance.

The majority is also critical of the fact finding process engaged in by Mr. Tilling. Specifically, the majority takes issue with Mr. Tilling's determination that racial bloc voting existed under the 1981 Plan. The majority indicates that Mr. Tilling did not engage in bivariate ecological regression analysis. Again, I respectfully submit that it was not the duty of the majority board to find racial bloc voting in order to justify the 1991 Plan.

The majority also discounted Mr. Tilling's findings of lack of responsiveness to the black community. The ma-

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[25] *See* Ohio Constitution, Article XI, § 10(A).

jority claims that his evidence is mostly "anecdotal . . . rather than from community sources." The record indicates otherwise. Mr. Tilling met with the leaders of every major minority group in the state of Ohio. He held public hearings inviting comments and criticisms from these groups, and accepted proposed plans from the various groups. Further, the record supports the conclusion that the 1991 Plan was largely the result of the collaboration of several minority groups working with the majority board.

In one of its few fact findings, the majority notes that in nine unspecified districts with either minority legislators or white legislators with a 90% to 100% voting record on bills related to minority issues, the 1991 plan increases the black population in each district. The Court observes that under the 1981 Plan the black population in these districts ranged from 38.5% to 53.19%, and that under the 1991 Plan the black population in each district was increased between 7.7% and 13.68%. Presumably, the Court holds that increasing the minority population in a district where a minority group is already able to elect a minority representative is *per se* packing and wasting minority votes.

Initially, such an argument ignores the fact that there were substantial population shifts in eleven districts represented by black legislators. Moreover, the black population in the six major urban counties has increased by 7.3%, while the white population has decreased by 1.67%. As Appendix 1 to this opinion demonstrates, the minority population in Cuyahoga County increased by 9,182, the minority population in Franklin County increased by 21,824, Hamilton County experienced a 15,151 increase, and Montgomery County noticed a 2,112 increase. Only Summit and Lucas County experienced a decrease in minority population. The additional black voters had to be placed in some district. Principles of geographical compactness dictate their placement, thus leading to an

overall increase in the black population in the districts in question.[26]

By arguing that the 1991 Plan is invalid because it increased the black population in districts where blacks were already able to effectively elect candidates of their choice, the majority apparently holds that the districts must be drawn in such a way that the black vote is *maximized*. Putting concerns of geographical compactness aside for the moment, I do not believe that the Voting Rights Act entitles any group, including white Democratic incumbents, to such preferential treatment. The Voting Rights Act prohibits the district lines to be drawn so that a minority's vote is *diluted* in such a way that they do not possess an equal opportunity to participate in the electoral process. By holding that the black vote must be maximized, the majority is, in essence, creating a favored race for voting purposes. I find that this was not the intention of Congress when it enacted the Voting Rights Act and subsequently amended the Act in 1982. Moreover, I find no judicial precedent for such a position.

Finally, it is difficult to find that there has been impermissible minority vote dilution in Ohio when one considers the fact that the blacks have been able to consistently elect more representatives in the six major urban counties than their percentage of the population would suggest. While blacks represented only 17.71% of the population under the 1980 census, black representation comprises 25% of the members of the House of Representatives for these six counties.

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[26] I wish to note that the claim is often raised that there is a flaw in the census taking procedure which results in an undervaluation of the existing black population. In that context the Court notes that the majority minority districts as created by the 1991 Apportionment Plan all contain a population that is *below* the ideal number of 109,567.

Fifteenth Amendment

Another avenue for relief for vote dilution is the fifteenth amendment. The Plaintiffs claim that they are entitled to relief under the fifteenth amendment because racial considerations played a part in the formation of the 1991 Apportionment Plan. The majority does not reach Plaintiffs' fifteenth amendment claim because it finds that the Defendant majority board members cannot establish a Voting Rights Act violation that would entitle them to redraw district lines in an attempt to create majority-minority districts. Since I believe both that the majority applied the wrong analysis, and that under the proper analysis no Voting Rights Act violation exists, I must address Plaintiffs' fifteenth amendment claim.

The United States Constitution Article XV states: "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Unlike a claim under the Voting Rights Act, an aggrieved minority voter must show intentional discrimination in order to prevail on a fifteenth amendment violation. *Garza, supra.; Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Mobile, supra; Armour v. State of Ohio*, 775 F. Supp. (N.D. Ohio 1991); and *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990). Thus, to prove a fifteenth amendment violation, the minority voter must establish: (1) actual intent to discriminate; and (2) injury as a direct result of discrimination. *Armour, supra.*; and *Jeffers, supra.*

The leading case on fifteenth amendment violations in relation to apportionment plans is *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, blacks challenged the redrawing of a district that eliminated all but four or five of its original 400 black voters without eliminating any white voters. In finding intentional black voter dilution, the Court relied on the result as well as the fact that the redistricting changed the district from a simple

square to an irregular 28 sided figure. The Court held that such maneuvering was highly suspect. In so holding, the Court noted that: "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the 15th Amendment." *Id.* at 346.

It is undisputed that the Defendant majority board members took race into consideration in creating the 1991 Apportionment Plan. Mr. Tilling repeatedly indicated in his deposition testimony and the facts presented at trial revealed that he was sensitive to the concerns of black political groups and worked with these groups to create the 1991 Plan. Plaintiffs argue that the fact that race was a consideration in drawing the district lines supports the finding of a fifteenth amendment violation.

Mere consideration of race, without more, is not sufficient to establish a fifteenth amendment violation. As the *Gomillion* Court noted, only specific discriminatory treatment violates the fifteenth amendment. Further, this Court in *Armour* held that there must be intentional diluting for political reasons in order to sustain a fifteenth amendment claim.

In this case, racial considerations did, indeed, play a part in the creation of the 1991 Apportionment Plan. Racial *discrimination*, however, did not. Under *Gomillion*, it is clear that there must be racial discrimination before a fifteenth amendment violation can be found. Plaintiffs have been unable to demonstrate an intent to discriminate. The evidence bears out that the Defendants considered race not for the purpose of discriminating against black voters, but rather to avoid violating the Voting Rights Act. If anything, the Defendants' consideration of race served to enhance the black vote. In light of these facts, I would not find a fifteenth amendment violation.

Ohio Constitution

This leaves just the Plaintiffs' claims under the Ohio Constitution. I agree with my colleagues that in light of the fact that these issues are pending before the highest court in Ohio, we should abstain.

Conclusion

In my view, judicial restraint in connection with apportionment of a state for legislative purpose is justified where:

1. The apportionment process has been completed in a manner consistent with the state's constitution.

2. The entire legislative body is elected on the basis of single member districts.

3. The apportionment of the state based upon the 1990 census figures does not violate the ten percent deviation rule adopted by the United States Supreme Court in *Connor v. Finch*, *supra*. in connection with continued compliance with the *Baker v. Carr*, *supra*. one man—one vote mandate.

4. The six urban counties in the state where the black population is primarily located are entitled to forty four of the ninety nine seats in the Ohio legislature and of those forty four districts, eleven are currently represented by minority representatives and there is no indication in the evidence before the Court that the apportionment has jeopardized the opportunity of the minority populations of the six counties to continue to elect the incumbent minority representatives.

5. The apportionment process was for the first time conducted in an open public manner with great deference to the black constituency in the six urban counties.

6. No election has yet been conducted.

7. Active judicial intervention in the apportionment process within approximately three weeks of the deadline for candidates to file for both the legislature and the senate threatens to work a hardship on the election process for the State of Ohio in 1992.

I am of the view that this case mandates judicial restraint. The Plaintiffs' have been unable to meet their burden of establishing a violation of the Voting Rights Act or the fifteenth amendment. Presented with a suitable plan, the Court should implement the 1991 Apportionment Plan and insure for Ohio an orderly election process in 1992.

Appendix 1

URBAN COUNTIES WITH BLACK INCUMBENT LEGISLATORS

County	No. Dist. [1]	1990 Pop. [2]	1990 Black Pop. [3]	% Black	Black Inc. Legislator [4]	1980 Pop. [5]	1980 Black Pop. [6]	% Black	M/M—+10% [7]
1. Cuyahoga	12.88	1,412,140	350,185	24.8	3	1,498,400	341,003	22.76	4-1
2. Franklin	8.77	961,437	152,840	15.9	2	869,126	131,016	15.07	1-1
3. Hamilton	7.90	866,228	181,145	20.9	2	873,204	165,994	19.01	2-1
4. Montgomery	5.24	573,809	101,817	17.7	2	571,697	94,561	16.54	1-1
5. Summit	4.70	514,990	61,185	11.9	1	524,472	56,831	10.84	0-1
6. Lucas	4.22	462,361	68,456	14.8	1	471,741	63,901	13.55	0-1
TOTALS	43.71	4,790,965	915,628	19.1	11	4,808,640	853,306	17.75	

[1] Figures represent the number of districts each county is entitled to based on the ideal district population of 109,567.

[2] Based on 1990 census information.

[3] Based on 1990 census information.

[4] Elected urder the 1981 Plan.

[5] Based on 1980 census information.

[6] Based on 1980 census information.

[7] "M/M" refers to majority-minority districts. The "10%" figure represents the influence districts that do not have a sufficient minority population to constitute a majority-minority district, but contain more than a 10% black population.

COUNTIES WITH POPULATION THAT EXCEEDS A SINGLE NUMBER DISTRICT

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M— +10%
7. Stark	3.26	367,585	25,052	6.82		378,823	24,111	6.36	0-1
8. Butler	2.66	291,479	13,134	4.51		258,787	12,072	4.66	0-0
9. Lorain	2.47	271,126	21,230	7.83		274,909	19,813	7.21	0-1
10. Mahoning	2.42	264,806	39,681	14.98		289,437	41,075	14.19	0-1
11. Trumbull	2.08	227,813	15,221	6.68		241,863	14,605	6.04	0-1
12. Lake	1.97	215,499	3,528	1.64		212,801	198	.09	0-0
13. Clermont	1.37	150,187	1,291	.86		128,483	921	.72	0-0
14. Clark	1.35	147,548	13,031	8.83		150,236	13,173	8.77	0-1
15. Portage	1.30	142,585	3,906	2.74		135,856	3,571	2.63	0-0
16. Green	1.25	136,731	9,611	7.03		129,769	8,792	6.78	0-0
17. Licking	1.17	128,300	2,217	1.73		120,981	2,036	1.68	0-0
18. Richland	1.15	126,137	9,981	7.31		131,205	9,373	7.14	0-0
19. Medina	1.12	122,354	850	.69		113,150	709	.63	0-0
TOTALS		2,592,150	158,733	6.12		2,566,300	150,449	5.86	

COUNTIES WITH A POPULATION WITHIN A FIVE PERCENT DEVIATION OF THE IDEAL POPULATION DISTRICT OF 109,567 MANDATING A SINGLE MEMBER DISTRICT FOR THE COUNTY[8]

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M—+10%
20. Warren		113,909	2,415	2.12		99,276	1,711	1.72	0-0
21. Wood		113,269	1,168	1.03		107,372	1,308	1.22	0-0
22. Allen		109,755	12,313	11.22		112,241	10,975	9.78	0-1
23. Columbiana		108,276	1,409	1.30		113,572	1,409	1.24	0-0
TOTALS		445,209	17,305	3.89		432,461	15,403	3.56	8-12

COUNTIES WITH A POPULATION WITHIN A TEN PERCENT DEVIATION OF THE IDEAL POPULATION DISTRICT OF 109,567 PERMITTING A SINGLE MEMBER DISTRICT FOR THE COUNTY[9]

24. Fairfield	1.1	103,461	1,153	1.11	93,678	319	.34	
25. Wayne	1.53	101,461	1,557	1.53	97,408	1,244	1.28	
26. Ashtabula	3.14	99,821	3,138	3.14	104,215	3,060	2.94	
TOTALS		304,743	5,848	1.92	295,301	4,623	1.57	

[8] *See* Ohio Constitution Article XI § 10(A).

[9] *See* Ohio Constitution Article XI § 10(B).

COUNTIES WITH A POPULATION THAT IS INSUFFICIENT TO PERMIT THE COUNTY CONSTITUTING A SINGLE MEMBER DISTRICT AND THUS REQUIRING THAT THE COUNTY BE PAIRED WITH ANOTHER COUNTY TO CREATE A SINGLE MEMBER DISTRICT

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M—+10%
27. Adams		25,371	47	.19		25,328	36	.14	
28. Ashland		47,507	460	.97		46,178	312	.68	
29. Athens		59,549	1,878	3.15		56,399	1,653	2.93	
30. Auglaize		46,585	66	.14		42,554	37	.09	
31. Belmont		71,074	1,308	1.84		82,569	1,592	1.93	
32. Brown		34,966	406	1.16		31,920	411	1.29	
33. Carroll		26,521	135	.51		25,598	115	.45	
34. Champaign		36,019	992	2.75		33,649	979	2.91	
35. Clinton		35,415	716	2.02		34,603	714	2.06	
36. Coshocton		35,427	415	1.17		36,024	414	1.15	
37. Crawford		47,870	253	.53		50,075	301	.60	
38. Darke		53,619	184	.34		55,096	170	.31	
39. Defiance		39,350	493	1.25		39,987	219	.55	
40. Delaware		66,929	1,424	2.13		53,840	1,259	2.34	

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M— +10%
41. Erie		76,779	6,312	8.22		79,655	5,888	7.39	
42. Fayette		27,466	662	2.41		27,467	724	2.64	
43. Fulton		38,498	93	.24		37,751	40	.11	
44. Gallia		30,954	871	2.81		30,098	913	3.03	
45. Geauga		81,129	1,056	1.30		74,474	990	1.33	
46. Guernsey		39,024	616	1.58		42,024	637	1.52	
47. Hancock		65,536	591	.90		64,581	523	.81	
48. Hardin		31,111	236	.76		32,719	211	.64	
49. Harrison		16,085	393	2.44		18,152	470	2.59	
50. Henry		29,108	147	.51		28,383	101	.36	
51. Highland		35,728	692	1.94		33,477	683	2.04	
52. Hocking		25,533	234	.92		24,304	117	.48	
53. Holmes		32,849	52	.16		29,416	10	.03	
54. Huron		56,240	597	1.06		54,608	577	1.06	
55. Jackson		30,230	218	.72		30,592	207	.68	
56. Jefferson		80,298	4,488	5.59		91,564	5,047	5.51	

57.	Knox	47,473	381	.80	46,304	294	.63
58.	Lawrence	61,834	1,559	2.52	63,849	1,541	2.41
59.	Logan	42,310	804	1.90	39,155	711	1.82
60.	Madison	37,068	2,764	7.46	33,004	1,523	4.61
61.	Marion	64,274	2,707	4.2	67,974	2,241	3.30
62.	Meigs	22,987	177	.77	23,641	206	.87
63.	Mercer	39,443	14	.04	38,334	17	.04
64.	Miami	93,182	1,779	1.91	90,281	1,768	1.96
65.	Monroe	15,497	19	.12	17,382	6	.03
66.	Morgan	14,194	570	4.02	14,241	554	3.90
67.	Morrow	27,749	64	.23	26,480	32	.12
68.	Muskingum	82,068	3,468	4.23	83,340	3,514	4.22
69.	Noble	11,336	7	.06	11,310	3	.03
70.	Ottawa	40,029	265	.66	40,076	245	.61
71.	Paulding	20,488	236	1.15	21,302	238	1.12
72.	Perry	31,557	57	.18	31,032	64	.21
73.	Pickaway	48,255	3,036	6.29	43,662	569	1.30
74.	Pike	24,249	327	1.35	22,802	242	1.06
75.	Preble	40,113	147	.37	38,223	140	.37

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M— +10%
76. Putnam		33,819	26	.08		32,991	22	.07	
77. Ross		69,330	4,467	6.44		65,004	3,416	5.26	
78. Sandusky		61,963	1,553	2.51		63,267	1,322	2.09	
79. Scioto		80,327	2,458	3.06		84,545	2,389	2.83	
80. Seneca		59,733	1,172	1.96		61,901	1,168	1.89	
81. Shelby		44,915	615	1.37		43,089	503	1.17	
82. Tuscarawas		84,090	623	.74		84,614	654	.77	
83. Union		31,969	1,188	3.72		29,536	565	1.91	
84. Van Wert		30,464	193	.63		30,458	113	.37	
85. Vinton		11,098	4	.04		11,584	9	.08	
86. Washington		62,254	774	1.24		64,266	780	1.21	
87. Williams		36,956	23	.06		36,369	9	.02	
88. Wyandot		22,254	20	.09		22,651	13	.06	

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

The majority opinion and the dissent were filed with the Clerk on Friday, January 31, 1992. The dissent made reference to Appendix 2. However, Appendix 2 was still undergoing final review and not ready for filing.

Appendix 2 is now complete and the Clerk is directed to file the same and to forward copies to counsel of record and to Judge Jones and Judge Peck.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX 2

FACT FINDINGS

I. BACKGROUND

1. The legislative body for the State of Ohio is the General Assembly consisting of a ninety nine member House of Representatives and a thirty three member Senate.[1]

2. Section 1 of the Article XI of the Ohio Constitution places the responsibility for the apportionment of the State of Ohio for the members of the General Assembly in a five person group consisting of the Governor, Auditor of State, Secretary of State, and two persons from the Ohio General Assembly, one from the House of Representatives and one from the Senate. Section 1 requires that such persons or a majority of their number shall meet and establish the boundaries for each of the ninety-nine House of Representatives districts and the thirty-three State Senate districts. The meeting is to convene on a date designated by the Governor between August 1 and October 1 in every year ending in the number one, such as 1971, 1981, 1991, etc. The apportionment is to be published by October 5 in the year in which it is made.[2]

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[1] *See* Article XI, Section 2 of the Ohio Constitution.

[2] Section 1 of Article XI of the Ohio Constitution provides that both major political parties will be represented by two General Assembly members participating in the apportionment process. The issue of which political party controls the process is then determined by the outcome of the last state election for the office of Governor, Auditor of State and Secretary of State conducted prior to the constitutional mandate to apportion the state in every year ending in the number one. In 1990 the last such state election, Governor George Voinovich and Secretary of State Robert A. Taft, both members of the Republican party, and State Auditor Thomas Ferguson, a member of the Democratic party, were elected. Thus, the Republican party has a majority involved in the apportionment process as dictated by the Ohio Constitution.

3. The persons charged with the responsibility for the apportionment of the Ohio General Assembly in 1991 were three Republicans, Governor George Voinovich, Secretary of State Robert A. Taft, and State Senator Stanley Aronoff, and two Democrats, State Auditor Thomas Ferguson and State Representative Barney Quilter.

4. Apportionment in Ohio anticipates the use of the most recent Federal Decennial Census, if available.[3] The Court takes judicial notice that the census for Ohio in 1990 fixed the state's population at 10,847,133. Ohio is divided into eighty-eight counties. The dominant urban counties ranked by the 1980 census are Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), Montgomery (Dayton), Summit (Akron), Lucas (Toledo), Stark (Canton), Butler (Middletown), Lorain (Elyria) and Mahoning (Youngstown). The 1980 and 1990 population of the eighty-eight counties are set forth on Appendix 1.

5. In preparation for the 1991 apportionment, the Ohio Legislative Task Force, a bipartisan effort, funded by the Ohio General Assembly, was established to deal with the technical issues in the 1991 apportionment including the collection and computerization of census data.[4]

6. The Ohio Legislative Task Force engaged Cleveland State University to prepare a "unified data base" for use by interested groups and the general public in the 1991 apportionment process.[5] The unified data base included PL-94171 population counts, racial demographic data and election results for all 1990 statewide races and 1990 Ohio House and Senate races. Population data was prepared by census tracts and ultimately converted to population data by wards and precincts.

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[3] *See* Article XI, Section 2 of the Ohio Constitution.

[4] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 23-26.

[5] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 27.

All data created by Cleveland State University in the unified data base has been stipulated in this proceeding.

7. The persons responsible for the 1991 apportionment first met on August 22, 1991. Thereafter, public hearings were held at fifteen sites throughout the State of Ohio over the ensuing two and one half weeks. The purpose of the public hearings was to obtain public comment concerning the 1991 apportionment. This was the first time in Ohio history that such public apportionment hearings were held and that the public was given access to a data base and computer terminal.[6]

8. On September 26, 1991, proposed apportionment plans were submitted by: (1) the majority of persons responsible for apportionment (Governor Voinovich, Senator Aronoff and Secretary of State Taft); (2) the minority of the persons responsible for apportionment (Auditor Ferguson and Representative Quilter); (3) the Ohio Conference of Branches of the NAACP; (4) the Black Elected Democrats of Ohio (BEDO); and (5) the Ohio Republican Party.[7]

9. Defendants' Exhibit 1 is the apportionment plan submitted by the majority of persons responsible for apportionment and adopted on October 1, 1991, amended on October 3, 1991 and published by the Governor on October 5, 1991. Defendants' Exhibit 76 is the apportionment plan submitted by the Ohio Conference of Branches of the NAACP.[8] Defendants' Exhibit 77 is the plan submitted by BEDO. Defendants' Exhibit 78 is the plan submitted by Plaintiffs Ferguson and Quilter on behalf of the Ohio Democratic party. Defendants' Ex-

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[6] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 31-33.

[7] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 34-36.

[8] The plan of the Ohio Conference of Branches of the National Association for the Advancement of Colored People contained introductory material six pages in length and is attached as Appendix 2.

hibit 79 is the plan submitted by the Ohio Republican Party.

10. The 1991 apportionment plan as adopted by the defendants Voinovich, Taft and Aronoff, as it relates to the interests of minorities and minority districts, was thoroughly discussed with minority representatives.

II. THE APPLICATION OF THE OHIO CONSTITUTION TO THE APPORTIONMENT PROCESS

11. Article XI of the Ohio Constitution, as extensively amended in 1967 in an obvious response to the one man—one vote decision of *Baker v. Carr*, 369 U.S. 186 (1962), provides in considerable detail the procedure by which the apportionment process will be accomplished.

12. Article XI, Section 10 addresses the creation and numbering of House Districts and provides:

> § 10 [Creation and numbering of house of representative districts.]
>
> The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representative districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent

of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than whole ratio of representation shall be divided into house of representatives districts. *Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.*

(D) The remaining territory of the state shall be combined into representative districts.

On August 22, 1991, Mr. Tilling was designated Secretary to the persons responsible for apportionment and was directed to draft a 1991 Apportionment Plan.[9]

13. Article XI, Section 10(A) and (B) first address the creation of whole county districts, that is, a district to be created from a single county. Once those districts have been identified and established, the provisions of Article XI, Section 10(C) plug in and address the division of counties with more than one whole house ratio into districts, beginning with the largest county. Once the process has been completed with respect to counties entitled to more than one whole district, the apportionment of the remainder of the State is completed by following the provisions of Article XI, Section 10(D).[10]

Pursuant to Section 10(A) and (B), the adopted 1991 Apportionment Plan begins with the creation of seven single whole county districts.[11]

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[9] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 7.

[10] See fact finding #12, *supra*.

[11] The counties are Allen (House District 1 with a population of 109,760); Warren (House District 2 with a population of 113,915); Columbiana (House District 3 with a population of 108,278); Wood (House District 4 with a population of 113,272); Ashtabula (House

14. The Apportionment Plan, after designating the first seven single county whole districts, created house districts in successive numerical order in Cuyahoga, Franklin, Hamilton, Montgomery, Summit, Lucas, and Stark counties. Many of the urban counties had spillover into an adjoining county as required by the provisions of Article XI, Section 10(C), which requires that ". . . any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county." The provisions of Article XI, Section 10(C) prohibit the Apportionment Board from establishing more than one district in a county entitled to more than one whole district that spills over into adjoining territory. No claim is made nor is there any proof that the required spillovers from the urban counties violated Section 10(C).

15. The one ratio of representation as provided in Section 2 of Article XI of the Ohio Constitution divided into the 1990 population for the urban counties is demonstrated on Appendix 1.

16. Article XI, Section 7(D) addresses the possible retention of districts established in the preceding apportionment. Article XI, Section 7(D) provides:

> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent* with the requirements of Section 3 of this Article.
>
> (Emphasis added)

District 5 with a population of 99,821); Fairfield (House District 6 with a population of 103,453); and Wayne (House District 7 with a population of 101,441). The latter three counties were designated as single house districts pursuant to the discretionary power contained in Seciton 10(B).

17. Article XI, Section 3 of the Ohio Constitution describes the population requirements for house districts and states:

> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with Section 9 of this Article.

18. The ratio of representation for the 1991 apportionment of the House of Representatives as determined by the formula set forth in Article XI, Section 2 is 109,567.

19. Appendix A (Defendants' Exhibit 2) is a map of the Ohio house districts as configured in the 1981 apportionment.

20. Appendix B (Defendants' Exhibit 3) is a map of the Ohio senate districts as configured in the 1981 apporment.

21. Appendix C (Defendants' Exhibit 4) is a map of the Ohio house districts as configured in the 1991 Apportionment Plan as adopted.

22. Appendix D (Defendants' Exhibit 5) is a map of the Ohio senate districts as configured in the 1991 Apportionment Plan as adopted.

23. Appendix E (Defendants' Exhibit 6) is a colorized map showing Ohio house districts as configured in the 1991 Apportionment Plan as adopted.

24. Appendix F (Defendants' Exhibit 7) is a colorized map showing Ohio senate districts as configured in the 1991 Apportionment Plan as adopted.

25. Appendix G (Defendants' Exhibit 8) is a colorized map showing Ohio house districts as proposed by Plaintiffs' Ferguson and Quilter in the 1991 Minority Plan as proposed.

26. Appendix H (Defendants' Exhibit 9) is a colorized map showing Ohio senate districts as proposed by Plaintiffs Ferguson and Quilter in the 1991 Minority Plan as proposed.

27. Appendix I (Defendants' Exhibit 57) displays the 1981 house districts keyed to the 1990 census population. Fifty four of the 1981 districts, less the single whole county districts of Ashtabula, District 5, Fairfield County, District 6, and Wayne County, District 7, must be reconfigured because the population of the remaining fifty one districts fails to conform to the provisions of Article XI, Section 3 of the Ohio Constitution.[12]

28. Appendix J (Defendants' Exhibit 13) provides the population for each house and senate district as established in the 1991 Apportionment Plan. With the exception of H.D. 68 and S.D. 32, which will be discussed, each house and senate district complies with the population requirements of Article XI, Sections 3, 4 and 9 of the Ohio Constitution.[13]

29. Appendix K (Defendants' Exhibit 14) provides the population of each house and senate district as pro-

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[12] Five per cent (5%) of 109,567 is 5,478. The fifty one districts in the 1981 Apportionment Plan have an upward or downward shift in population in excess of 5,478.

[13] The defendants contend that in order to comply with other mandates of the constitution as well as the decision in the *Armour* case, it was necessary to create two undersized districts, House District 68 and Senate District 32. The question of whether those undersized districts which are below the 5% deviation limitation in the Ohio Constitution violate the Ohio Constitution is presently before the Ohio Supreme Court in a case brought by the defendants in this case wherein they seek a declaratory judgment approving the creation of House District 68 and Senate District 32.

posed by Plaintiffs Ferguson and Quilter in the 1991 Minority Plan as proposed.

30. Appendix L (Defendants' Exhibit 54) displays the 1981 senate districts with 1990 census populations.

31. Appendix M (Defendants' Exhibit 55) displays the 1990 populations for 1991 senate districts as configured in the 1991 Apportionment Plan as adopted. Appendix N (Defendants' Exhibit 56) displays the same information for senate districts as proposed by Plaintiffs Ferguson and Quilter in the proposed 1991 Minority Plan.

32. The majority of the apportionment board created multiple districts from whole counties in the following order: Cuyahoga, Franklin, Hamilton, Montgomery, Summit, Lucas, Stark, Butler, Lorain and Mahoning Counties.

a) Cuyahoga County (Cleveland) consists of House Districts 8-20. House District 15 spills over into three townships of Medina County, Hinckley, Granger and Sharon. The population fluctuation among the thirteen house districts in the thirteen districts of Cuyahoga County is from the low of 104,872 to a high of 114,955.

b) Franklin County (Columbus) consists of House Districts 21-29 and part of House District 29 spills over into Pickaway County and includes Darby, Scioto, Muhlenberg, Monroe, Jackson, Perry, Deer, and Wayne Townships; parts of Harrisburg Village and New Holland Village contained in Pickaway County; and the Villages of Orient, Commercial Point, Darbyville, and Williamsport. The population fluctuation among the nine house districts of Franklin County is from a low of 104,979 to a high of 113,427.

c) Hamilton County (Cincinnati) consists of House Districts 30-37 with no spill over into adjoining counties. The population fluctuation among

the eight house districts of Hamilton County is from a low of 104,424 to a high of 114,073.

d) Montgomery County (Dayton) consists of House Districts 38-43 with the only part of Montgomery County in the spillover House District 43 being Huber Heights City and the remaining portion of House District 43 is contained in part of Miami County to the north. The population fluctuation is from a low of 104,000 to a high of 111,246.

e) Summit County (Akron) consists of House Districts 44-48 with House District 48 spilling over into part of Portage County including Suffield, Rootstown, Randolph, and Atwater Townships and all of Brimfield Township, except for that part in the City of Kent, and the Village of Mogadore. The population fluctuation is from a low of 105,500 to a high of 113,614.

f) Lucas County (Toledo) consists of House Districts 49-53. House District 53 contains Oregon City, Jerusalem Township, and Harborview Village in Lucas County and the remainder of the district spills over and includes all of Ottawa County and the City of Sandusky in Erie County, and additionally, Perkins, Oxford, Groton, Margarette, and Kelley's Island Townships. The population fluctuation is from 104,395 to 113,501.

g) Stark County (Canton) consists of House Districts 54-57. The majority of House District 57 lies outside of Stark County and includes all of Carroll County, parts of Mahoning County (Youngstown) including Smith, Goshen, Berlin, Milton, Jackson, Ellsworth, Green, Beaver, and Springfield Townships, and part of Canfield Township and the City of Canfield, Sebring Village and New Middleton Village. The only parts of Stark County in House District 57 are the City of Alliance, the Village of Minerva, and

Paris, Washington and Lexington Townships. The population fluctuation is a low of 107,746 to a high of 113,515.

h) Butler County (Middletown) consists of House Districts 58-60. House District 60 includes part of Butler County and all of Trumbull County. The population fluctuation is a low of 107,036 and a high of 113,748.

i) Lorain County (Elyria) consists of House District 61-63. House District 63 contains a part of Lorain County, Erie County and Huron County. The population fluctuation is a low of 113,457 and a high of 114,684.

j) Mahoning County (Youngstown) consists of whole House Districts 64 and 65 and the remaining part of Mahoning County spills over into House District 57 (*see* 32(g) *supra*). House Districts 64 and 65 were created in response to the *Armour* decision.

III. THE PROCESS OF APPORTIONMENT AS FOLLOWED BY THE MAJORITY

A. In General

33. As indicated in the 1990 census, the total population of Ohio remained at approximately 10 million people, virtually the same as in the 1980 census. Ohio experienced only a net gain of population of 50,000 people. However, there were significant population shifts within the state. Specifically, there occurred a substantial shift in population from the Northeast quadrant of the state to the Central and Southwest portions of the state, particularly to Franklin, Delaware, Union and Madison counties. There also occurred a population shift from Cincinnati and Hamilton County to Butler, Clermont and Warren counties. Cuyahoga County lost one entire house district in population (109,000 people) while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous

county in the state. There were also significant population shifts from the inner cities to the suburbs.[14]

34. As a result of major population shifts within counties and from the inner city to the suburbs, the vast majority of the 1981 configured districts in all major urban areas had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution.[15] A summary of the 1981 house districts with 1990 census population data indicating whether the 1981 district meets the requirements of Article XI, Section 3, or is too high or too low follows:[16]

1981 APPORTIONMENT HOUSE DISTRICTS
WITH 1990 CENSUS POPULATION
FOR MAJOR URBAN COUNTIES

Ideal House District Population—109,567 Range—104,089-115,045		(Name of Black Representative Currently Serving The 1981 District)	Article XI, Section 3 Requirements
	CUYAHOGA COUNTY		
6	113,674		Meets requirements
7	107,304		Meets requirements
8	100,798		Too low
9	100,461		Too low
10	108,686		Meets requirements
11	96,086		Too low
12	84,098	(James)	Too low
13	104,883		Meets requirements
14	91,972	(Prentiss)	Too low
15	99,173		Too low
16	96,258	(Whalen)	Too low
17	107,097		Meets requirements
18	101,314		Too low
19	100,333		Too low

[14] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 61-63.

[15] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 79-80.

[16] The source is Defendants' Exhibit 58.

Ideal House District Population—109,567 Range—104,089-115,045		(Name of Black Representative Currently Serving The 1981 District)	Article XI, Section 3 Requirements
		HAMILTON COUNTY	
20	122,802		Too high
21	99,465		Too low
22	108,124		Meets requirements
23	97,630	(Mallory)	Too low
24	102,789		Too low
25	99,765	(Rankin)	Too low
26	119,239		Too high
27	116,413		Too high
		FRANKLIN COUNTY	
28	116,369		Too high
29	106,537	(Miller)	Meets requirements
30	118,913		Too high
31	97,764	(Beatty)	Too low
32	111,070		Meets requirements
33	115,186		Too high
34	138,011		Too high
35	157,601		Too high
		MONTGOMERY COUNTY	
36	115,907	(McLin)	Too high
37	108,769	(Roberts)	Meets requirements
38	116,087		Too high
39	106,321		Meets requirements
40	118,434		Too high
		SUMMIT COUNTY	
41	107,879		Meets requirements
42	105,536	(Sykes)	Meets requirements
43	108,031		Meets requirements
44	113,743		Meets requirements
		LUCAS COUNTY	
45	107,825	(Jones)	Meets requirements
46	108,701		Meets requirements
47	102,736		Too low
48	121,371		Too high

35. A summary of the statistical findings as it relates to the 1981 legislative districts as set forth in Fact Finding No. 34 in the context of the need to reconfigure as it applies to districts represented by incumbent minority (black) representatives follows:

a) Nine (9) out of the fourteen (14) districts in Cuyahoga County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 8, 9, 11, 12, 14, 15, 16, 18 and 19. These districts include all districts represented by minority incumbents (H.D. 12 (James), 15 (Prentiss) and 16 (Whalen)). The remaining districts (H.D. 6, 7, 11, 13 and 17) cannot be retained intact given the population requirements of the other districts. Moreover, the fourteen districts must be reduced to thirteen districts by reason of the population loss in Cuyahoga County.

b) Seven (7) out of the eight (8) districts in Hamilton County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 20, 21, 23, 24, 25, 26, and 27. These districts include the two districts represented by minority incumbents (H.D. 23 (Mallory) and H.D. 24 (Rankin)). The remaining district (H.D. 22) cannot be retained intact because of the population requirements of the other districts.

c) Six (6) out of the eight (8) districts in Franklin County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 28, 30, 31, 33, 34 and 35. These districts include the district represented by minority incumbent Otto Beatty (H.D. 31). The two remaining districts cannot be retained intact because of the population requirements of the other districts.

d) Three (3) out of the five (5) districts in Montgomery County must be reconfigured to meet the population requirements of Article XI, Section 3.

These districts are H.D. 36, 38 and 40. These districts include the district represented by minority incumbent McLin (H.D. 36). The remaining districts cannot be retained intact because of the population requirements of the other districts.

e) In Summit County, all districts (H.D. 41-44) meet the population requirements of Article XI, Section 3. These districts were reconfigured to avoid splitting the black community in Summit County and to avoid minority voter dilution.

f) In Lucas County, two (2) out of four (4) districts do not meet the requirements of Article XI, Section 3. These districts are H.D. 47 and 48. The remaining districts, including H.D. 45 represented by minority incumbent Jones, cannot be retained intact because of population requirements of other districts and to avoid minority voter dilution.

36. It was necessary to reconfigure the legislative districts in the major urban counties to comply with the population requirements of Article XI, Section 3 of the Ohio Constitution.

37. The comparisons of black population by district as configured in the 1981 apportionment, the 1991 Apportionment Plan adopted by the defendants (the majority plan) and the 1991 apportionment plan as proposed by the plaintiffs Ferguson and Quilter (the 1991 minority plan) follow:

COMPARISON OF HOUSE DISTRICTS WITH MINORITY REPRESENTATION IN 1981 DEMOCRAT PARTY 1991 MAJORITY APPORTIONMENT PLAN AND 1991 MINORITY APPORTIONMENT PLAN

1981 Democrat Plan	1991 Majority Plan [17]		1991 Minority Plan	
6-19 Cuyahoga	8-20 Cuyahoga		6-18 Cuyahoga	
16—94.67% [18]	10—63.42% [19]	67.35%	12—67.08%	70.81%
	1990 Pop. 105,514			
14—90.05%	12—65.13%	67.25%	16—66.67%	69.17%
	1990 Pop.—105,424			
12—74.80%	8—61.41%	65.64%	14—63.71%	68.20%
	1990 Pop.—104,972			
15—34.80%	9—58.36%	62.30%	13—60.18%	63.86%
	1990 Pop.—108,572			
17—26.14%	11—40.61%	43.01%	15—26.46%	27.89%
	1990 Pop.—105,024			
18—14.70%	14— 6.86%	7.92%	11— 7.32%	8.54%
19—14.40%	19— 3.71%	4.63%	18— 6.03%	6.87%
13— 4.99%	15— 3.25%	3.29%	9— 5.14%	6.05%
11— 4.44%	17— 2.34%	2.85%	17— 2.97%	3.12%
9— 4.16%	13— 2.32%	2.75%	7— 2.19%	2.62%
7— 2.36%	18— 1.31%	1.41%	8— 1.16%	1.23%
8— 2.12%	16— 0.45%	47%	10— 0.49%	0.66%
10— 0.64%	20— 0.23%	0.31%	6— 0.44%	0.47%
6— 0.49%				

[17] In every majority-minority or black influence district with respect to the eight urban counties of Cuyahoga, Franklin, Hamilton, Montgomery, Summit, Lucas, Stark and Mahoning, the population of the district is less than the ratio of representation number of 109,567.

[18] Black percentage of total population.

[19] Black Voting Age Population.

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
28-35 Franklin	21-29 Franklin		19-26 Franklin	
31—46.80%	21—50.30%	55.92%	21—50.60%	53.85%
	1990 Pop.—106,606			
29—38.50%	22—44.31%	48.29%	19—46.40%	50.80%
	1990 Pop.—104,979			
32—26.60%	26— 8.07%	8.66%	20—10.88%	12.45%
30—12.40%	25— 7.96%	8.41%	22— 6.61%	7.04%
28— 5.90%	23— 7.78%	8.32%	26— 5.23%	5.99%
34— 5.10%	29— 4.47%	4.32%	24— 4.15%	5.08%
33— 4.10%	24— 3.92%	4.22%	23— 4.78%	4.79%
35— 1.40%	28— 3.56%	3.75%	25— 1.49%	1.62%
	27— 3.09%	3.57%		
20-27 Hamilton	30-37 Hamilton		27-34 Hamilton	
25—53.20%	30—56.83%	62.07%	28—57.91%	61.26%
	1990 Pop.—106,539			
23—45.90%	31—52.60%	59.82%	33—47.10%	55.49%
	1990 Pop.—104,614			
24—32.30%	32—21.58%	24.00%	34—19.55%	21.67%
	1990 Pop.—104,424			
22—12.60%	35— 7.91%	8.96%	32—16.71%	18.46%
27—12.20%	33— 7.50%	8.04%	31— 3.55%	4.39%
20— 8.90%	36— 4.08%	4.49%	30— 3.26%	3.96%
21— 7.50%	37— 1.94%	2.14%	27— 3.11%	3.46%
26— 2.70%	34— 1.90%	2.14%	29— 2.30%	2.53%
36-40 Montgomery	38-43 Montgomery		35-39 Montgomery	
36—41.10%	38—50.70%	54.78%	36—45.26%	47.63%
	1990 Pop.—104,812			
37—36.10%	39—29.23%	32.35%	37—36.20%	40.79%
	1990 Pop.—104,427			
40— 6.20%	43— 3.61%	3.86%	35— 3.62%	4.23%
39— 4.70%	40— 2.84%	3.30%	39— 2.71%	3.21%
38— 0.91%	42— 2.28%	2.76%	38— 0.99%	1.09%
	41— 1.18%	1.31%		

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
41-44 Summit	44-48 Summit		40-43 Summit	
42—35.40%	44—39.52%	43.26%	42—43.09%	47.20%
	1990 Pop.—105,500			
44— 9.00%	45— 5.40%	6.29%	41— 3.81%	4.25%
43— 2.90%	47— 5.00%	6.00%	43— 2.54%	2.88%
41— 2.30%	46— 1.12%	1.33%	40— 2.24%	2.54%
	48— 0.61%	0.53%		
45-48 Lucas	49-52 Lucas		44-47 Lucas	
45—41.70%	49—47.65%	50.92%	45—44.98%	50.12%
	1990 Pop.—104,395			
47—13.20%	52— 4.85%	5.65%	46— 4.70%	5.73%
46— 5.30%	50— 4.23%	5.46%	47— 4.16%	5.22%
48— 2.80%	51— 2.18%	2.40%	44— 3.02%	3.34%
49-51 Stark	54-57 Stark		48-50 Stark	
50—14.90%	54—12.93%	15.15%	50—12.49%	14.49%
	1990 Pop.—108,609			
49— 4.43%	55— 3.39%	3.84%	49— 3.43%	3.84%
51— 1.30%	57— 2.64%	2.98%	48— 3.08%	3.52%
	56— 1.15%	1.20%		
52-53 Mahoning	64-65 Mahoning		55-56 Mahoning	
53—27.80%	64—31.19%	35.53%	55—31.19%	35.53%
	1990 Pop.—106,174			
52—10.50%	65— 1.48%	1.64%	56— 1.44%	1.60%
Total (Minority Districts Over 10%)				
24	16	16	18	18
Total (Minority—Majority (Over 50%))				
4	8	9	6	9

38. By way of summary, the 1991 Apportionment Plan has four (4) majority-minority districts in Cuyahoga County with black voting age populations of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with black populations of 74.89%, 90.05% and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%.[20]

39. The 1991 Apportionment Plan also creates a strong influence district in Cuyahoga County of 40.61% compared to an influence district of only 26.46% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.[21]

40. The 1991 Apportionment Plan has one (1) majority-minority district in Franklin County at 50.30% black voting age population where none existed in the 1980 apportionment. The 1991 Apportionment Plan also has a strong influence district at 44.31%. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs' Ferguson and Quilter also has one (1) majority-minority district at 50.60% black voting age population and one influence district at 46.40%. Significantly, part of the rationale in the 1991 Apportionment Plan for increasing relative black percentages in Franklin County house districts from the 1981 plan was to create a Senate influence district in Franklin County.[22]

41. The 1991 Apportionment Plan creates two (2) majority-minority districts in Hamilton County where only one existed in the 1981 apportionment. The majority-minority districts in the 1991 Apportionment Plan have

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[20] Defendants' Exhibit 77.

[21] Defendants' Exhibit 77.

[22] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 103-104.

black voting age populations of 52.60% and 56.83%. By way of camparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also reflects one (1) majority-minority district at 57.91%. The 1991 Apportionment Plan also reflects an influence district of 21.58% compared to 19.55% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

42. The 1991 Apportionment Plan reflects one (1) majority-minority district in Montgomery County, where none existed in the 1981 apportionment. The 1991 Apportionment Plan has a district with a black voting age population of 50.70% and an influence district at 29.23%. By way of comparison the plan presented by plaintiffs Ferguson and Quilter has no majority-minority districts and two influence districts at 36.20% and 45.26%. Plaintiffs challenge no districts in Montgomery County.

43. The 1991 Apportionment Plan reflects a slight increase in black population in House District 42, in Summit County, currently represented by minority incumbent Representative Sykes. The increase is from 35.40% to 43.26% black population. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also increases the black population in Representative Sykes' district from 35.40% to 47.20%. Plaintiffs challenge no districts in Summit County.

44. The 1991 Apportionment Plan reflects an increase in black population in House District 45, in Lucas County, which is comparable to the district currently represented by minority incumbent Representative Casey Jones. The black voting age population in Jones' district was increased to 47.65% compared to 44.98% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. The black populations in House Districts 45 and 47 in the 1991 Apportionment Plan are substantially similar to the 1991 Apportionment Plan proposed by Plaintiffs Ferguson and Quilter.

45. In Stark County, there is not sufficient black population to form a majority-minority district.

46. The districts in Mahoning County are configured pursuant to the order of the Federal District Court in *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991).

47. Overall, there are eight (8) majority-minority districts in the 1991 Apportionment Plan compared to only four (4) in the 1981 apportionment and six (6) in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

48. Further, there is no relative reduction in the number of districts with over 10% black voting age population. In the 1991 Apportionment Plan, there are twenty (20) districts with over 10% black voting age population, precisely the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. Appendix O (Defendants' Exhibit 18).

49. The 1991 Apportionment Plan doubles the number of majority-minority districts in Ohio while maintaining the same relative composition of black population in the current districts represented by minority incumbents.

50. Appendix P (Defendants' Exhibit 21) reflects the percentage change in black population in districts served by minority incumbents. Three districts in Cuyahoga County with a black population of 74.8%, 90.1% and 94.6% under the 1981 apportionment plan were reduced to 65.6%, 67.0% and 67.0% black population.

51. All eleven (11) districts currently served by minority incumbents remain strongly Democratic districts. Appendix Q (Defendants' Exhibit 59).

IV. THE INTENTIONAL DISCRIMINATON CLAIM.

A. In General

52. Mr. Tilling was elected Secretary to the apportioning persons on August 22, 1991. Mr. Tilling was directed by the majority members of the Apportionment Board to draft a proposed Apportionment Plan.[23]

53. Mr. Tilling is Chief Executive Officer of the Ohio Senate and has been so employed since January, 1985.[24] Mr. Tilling has a B.S. degree in Social Sciences from Clarkson University, a Masters degree in political science from the University of Illinois, with a major in urban and metropolitan politics, and has completed course work toward a PhD.[25] Mr. Tilling is a former professor of political science at Ohio University where he taught from 1969 to 1976.[26]

54. In 1981, Mr. Tilling participated in a bipartisan effort to prepare the 1981 Congressional redistricting plan.[27] Mr. Tilling's testimony concerning the 1981 Congressional plan was considered by the Federal District Court in *Flanagan v. Gillmor*, 561 F. Supp. 36, 42 (S.D. Ohio, 1982), where a three judge court upheld the 1981 Congressional plan against claims of racial discrimination.

55. In 1981, Mr. Tilling observed the proposal of an Ohio Constitutional amendment to provide for fair and impartial state apportionment. The proposed amendment was supported by the ACLU and the Council of Churches but was defeated at the polls.[28]

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[23] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 7-8.

[24] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 4.

[25] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 5.

[26] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 6.

[27] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 10.

[28] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 10-11.

56. Mr. Tilling has served the last four years on the National Conference of State Legislators ("NCSL"), a bipartisan organization composed of representatives of all fifty states and designed to deal with issues of importance to state legislatures. Mr. Tilling is currently Vice-Chair of the NCSL Reapportionment Task Force.[29]

57. In his involvement with the NCSL Task Force, Mr. Tilling has chaired panels on minority voting issues under the Voting Rights Act.[30] Mr. Tilling has worked closely with Clifford Collins, Director of Voter Education of the NAACP, with James Daniels, State Chairman of the Ohio Conference of Branches of the NAACP, Frank Allison, President of the Cincinnati Branch of the NAACP, Fred Parker, President of the Columbus Branch of the NAACP, Floyd Johnson, State Coordinator for Ohio Apportionment, and other minority representatives.[31] Mr. Tilling has also participated in regional conferences, sponsored by the NAACP, regarding minority voting issues.[32] Mr. Tilling has also participated in panels, co-hosted by the United States Bureau of the Census, dealing with apportionment issues.[33]

58. On September 30, 1991, the Apportionment Board met to hear testimony from the various proponents of the proposed plans.[34]

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[29] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 9, 12.

[30] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 13, 14, 15, 18, 19.

[31] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 14, 15, 19.

[32] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 19.

[33] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 14.

[34] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 36-37.

59. On October 1, 1991, the Apportionment Board met again to consider adoption of a final plan of apportionment. The meeting was recessed from time to time to permit discussions among representatives of BEDO and the NAACP and Mr. Tilling to attempt to reach a consensus concerning minority districts.[35]

60. The above-referred discussions were initiated by Mr. Tilling after representatives of BEDO and the NAACP failed to reach a consensus regarding minority districts. Mr. Tilling contacted Congressman Stokes to attempt to bring the minority groups together. Mr. Tilling initiated these discussions since he knew that minority voting issues would be the focal point of the apportionment process.[36]

61. Floyd Johnson currently holds two offices in the NAACP. He is both the Chairman of the Political Action Committees for the Dayton Branch and the coordinator for reapportionment and redistricting for the Ohio Conference of Branches. Mr. Johnson has been associated with the NAACP for the last twenty-five years. He has held the position of chairman of the Political Action Committee for the Dayton branch for approximately five years and has held the position of Coordinator for Reapportionment and Redistricting for one year. Mr. Johnson was appointed Coordinator for Reapportionment and Redistricting for the Ohio Conference Branches of the NAACP.[37]

62. Mr. Johnson has been actively involved in minority voting issues since 1963.[38] Mr. Johnson assisted the late

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[35] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38-40.

[36] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38, 39, 42.

[37] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 6, 7.

[38] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 11.

Representative C.J. McLin in voter registration drives encouraging minorities to register to vote.[39] Further, Mr. Johnson has been an active member of the Democratic Voters League; he was also a member of the Congress of Racial Equality in 1963, a supporter of the Nonviolent Coordinating Committee in 1963 and the Dayton Alliance for Racial Equality.[40] Additionally, Mr. Johnson has been a registered Democrat since 1960.

63. Mr. Johnson was primarily responsible for the preparation of the proposed apportionment plan submitted by the Ohio Conference of Branches of the NAACP.[41] Mr. Johnson solicited suggestions and recommendations from the Reapportionment and Redistricting Committee comprised of all of the presidents of the branches.[42] Most active among the branch presidents included Frank Allison from Cincinnati, Fred Parker from Columbus, Jesse Gooding from Dayton, and James Daniels, President of the Ohio Conference.[43] Mr. Johnson also discussed the proposed plan with Dana Mattison, the Executive Director of the Black Elected Democrats of Ohio.[44]

64. BEDO was represented in the October 1, 1991 Apportionment Hearing by Dana Mattison, its Executive Director.[45]

65. During the public hearing conducted on October 1, 1991, BEDO and the NAACP reached a consensus regarding the establishment of minority districts in Cuy-

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[39] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 11.

[40] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 12.

[41] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 18.

[42] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 16, 19.

[43] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 16.

[44] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 19.

[45] Deposition of Dana Mattison, Defendants' Exhibit 82, sub exhibit C; p. 14.

ahoga County in the final 1991 apportionment plan. The NAACP accepted BEDO's proposal for Cuyahoga County, establishing four majority-minority districts and one influence district in Cleveland. The NAACP's original plan established five majority-minority districts in Cuyahoga County. The plan originally submitted by the Board also called for five majority-minority districts in Cuyahoga County.[46]

66. On October 1, 1991, BEDO offered the consensus position with regard to the districts in Cuyahoga County as an amendment to the BEDO plan (referred to herein as the "BEDO Amendment"). The BEDO Amendment was also offered as an amendment to the plan proposed by the majority of persons responsible for apportionment.[47] The amendment was accepted by the Apportionment Board and incorporated in the final 1991 Apportionment Plan.[48]

67. At the meeting of October 1, 1991, Dana Mattison and Senator Jeff Johnson, a minority Senator from Cuyahoga County, endorsed the BEDO Amendment creating four majority-minority districts. Floyd Johnson, on behalf of the NAACP, endorsed the entire 1991 Apportionment Plan.[49]

68. The BEDO Amendment was endorsed by William Mallory, President of BEDO and Congressman Stokes.[50]

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[46] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 43.

[47] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 41.

[48] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 44.

[49] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 40; Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 83-89; Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 58.

[50] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 89, 90, 91.

Appendix R (Defendants' Exhibit 24) is a letter from William Mallory to James Tilling dated October 1, 1991, confirming BEDO's support for the BEDO Amendment.[51]

69. The Ohio Conference of Branches of the NAACP endorsed the 1991 Apportionment Plan in its entirety.[52]

B. As to the Apportionment of Specific Counties.

70. As discussed above, BEDO and the NAACP both endorsed the 1991 Apportionment Plan as respects Cuyahoga County. BEDO Executive Director Dana Mattison supported the 1991 Apportionment Plan for Cuyahoga County given racial bloc voting in the county, the major population drifts from the inner city to the suburbs of Cleveland and low minority voter turnout in Cleveland.[53]

71. BEDO specifically recommended an *increase* from the 1981 plan in black population percentages in the two districts in Franklin County currently represented by Representatives Miller and Beatty to avoid minority vote dilution under the Voting Rights Act. Mr. Mattison testified:

> Q. So you increased Ray Miller's district more than the majority did in adopting the '91 plan?
>
> A. In this particular case.
>
> Q. Well, tell me generally why you went from 38 to 50 percent in Ray Miller's district?
>
> A. Well again we looked at the totality of circumstances, looked at a number of issues and came to the conclusion that these were the figures necessary again to comply with our understanding of the Voting Rights Act.[54]

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[51] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 116.

[52] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 57-59.

[53] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 14-16, 89-92; Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 58.

[54] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 58.

72. BEDO supported an *increase* in black population in both districts represented by minority incumbents, Representatives Mallory and Rankin, even though these incumbents have been elected over the years.

> Q. Now going back to Hamilton County just briefly, for a second, same situation. Rankin and Mallory have been representatives elected over a long period of time and yet you increased the percentage of black population.
>
> A. Uh-hum.
>
> Q. Why is that?
>
> A. Again, this is an individual district by district examination. We believe that communities respond differently based on a whole range of circumstances. Again, understand that Representative Rankin came to that district after her husband passed away, and there is a long-standing relationship with voters, but that does not mean that the trends indicate that that's going to continue over time, *and what we tried not to do was to construct districts based on incumbents. That's just not the reasonable thing to do.* (Emphasis added.)[55]

73. In Montgomery County House District 36 as established by the 1981 Apportionment Plan now exceeds the population requirements of Article XI, Section 3 of the Ohio Constitution. However, blacks are migrating from Representative McLin's district to Representative Robert's district so that, over time, McLin's district will lose black population and Robert's district will gain black population. Mr. Tilling recognized this population drift in his configuration of districts in Montgomery County.[56]

74. Both BEDO and Plaintiffs Ferguson and Quilter also recognized these population shifts in configuring

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[55] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 72.

[56] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 87-88.

districts in Montgomery County in their respective plans.[57]

75. Floyd Johnson, representing the NAACP, endorsed the 1991 Apportionment Plan as respects the configuration of all the minority districts in the 1991 Apportionment Plan, specifically those minority districts in Montgomery County. Mr. Johnson acknowledged that population shifts in Montgomery County required increases in black population in Representative McLin's district in order to maintain McLin's district as a minority district. Further, with the construction of the Trotwood corridor in the construction of Highway 35, black population would be displaced from Representative McLin's district.[58]

76. Mr. Tilling recommended an increase in the black population in Representative Sykes' district in Summit County to avoid minority voter dilution since the district is losing black population.[59] This recommendation was endorsed by Floyd Johnson for the NAACP.[60] BEDO also recommended an increase in the percentage of the black population in Sykes' district from 35% to 52% based on the same analysis.[61]

77. BEDO's plan increased the black population in Representative Jones' district in Lucas County due to population shifts in the district and because an expansion of the University of Toledo will displace black population.[62] Mr. Tilling employed the same rationale to the configuration of this district in Lucas County in the 1991 Apportionment Plan.[63]

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[57] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 70.

[58] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 46-48.

[59] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 88-89.

[60] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 50.

[61] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 75.

[62] Deposition of Dana Mattison, Defendants' Exhibit 98, pp. 80-81.

[63] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 89-90.

78. Both BEDO and NAACP recognize that increasing the black population in certain districts will result in a marginal reduction in black population in other districts. It is not possible to increase the minority population of some districts without reducing it in others. Dana Mattison, for example, testified:

> Q. Why didn't BEDO maintain minority districts as they were in 1980 with a spread of black population of 12.20% up to 53% as opposed to creating two districts at 47 and 57 percent [in Hamilton County] and taking black population from the remaining districts?
>
> A. Well, primarily because of our understanding of totality of circumstances much of which was new to the political arena vis-a-vis the 1982 amendment to the Voting Rights Act that wasn't present in 1980, and based on our assessment these were the numbers that were required to comport with our understanding of the requirements.
>
> Q. But the effect of doing that, Mr. Mattison, is to reduce the black population in the remaining districts in Hamilton County?
>
> A. That's what happens when you've got too few African-Americans in a district based again on totality of circumstances and they got to come from somewhere.[64]

V. TOTALITY OF CIRCUMSTANCES

A. Geographical Cohesion of Minority Communities

82. Significant minority populations in all major urban counties are geographically compact and contiguous.[65]

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[64] Deposition of Dana Mattison, Defendants' Exhibit 98, pp. 56-57.

[65] Defendants' Exhibits 26, 30, 34, 38, 42, 46, and 50; deposition of James Tilling, Defendants' Exhibit 96, pp. 63-77.

83. The districts created in the 1991 Apportionment Plan are geographically compact and contiguous.[66]

B. Political Cohesion

84. All minority districts in the 1991 Apportionment Plan are politically cohesive. Blacks tend to vote for democratic candidates by a substantial majority.[67]

C. Racial Bloc Voting

85. In preparing the 1991 Apportionment Plan, Mr. Tilling considered election returns for house and senate and statewide races from 1982 through 1990. He also considered the Jesse Jackson primary campaign for President. Mr. Tilling did a precinct-by-precinct review and found significant evidence of racial bloc voting statewide.[68]

86. Defendants' expert, Dr. Gary King, is Professor of Government at Harvard University and is Director of the Harvard Data Center. Dr. King is a political scientist and statistician, specializing in quantitative methods and application of quantitative methods to redistricting. Dr. King received his Ph.D from the University of Wisconsin in 1984. Dr. King has published extensively in the area of apportionment. Dr. King has received numerous grants and awards in his area of expertise. Dr. King is an editorial board member of several scholarly journals published in his area of expertise. Dr. King has lectured

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[66] Defendants' Exhibits 27-29 (Cuyahoga), 31-33 (Franklin), 35-37 (Hamilton), 39-41 (Montgomery), 43-45 (Summit), 47-49 (Lucas) and 51-53 (Mahoning); Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 63-77.

[67] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 64-66.

[68] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 91-93.

extensively in the area of political science and apportionment.[69]

87. Dr. King analyzed over 200 elections in Ohio from 1982 through 1990. Dr. King conducted a bivariate ecological regression analysis and determined that *all* the data indicated significant racially polarized voting.[70]

88. Dr. King verified the results of his bivariate ecological regression analysis by conducting a homogeneous precinct analysis and an analysis based on an aggregated compound multinomial model. These analyses confirmed the results of the bivariate ecological regression analysis.[71]

89. There exists evidence of a history of official discrimination in the State of Ohio and local political subdivisions that touched the rights of minorities to participate in the democratic process. This evidence includes:

a) The 1981 apportionment plan was held to unlawfully dilute minority voting strength in *Armour v. State of Ohio*, Case No. C88-1104Y (Slip Op. dated 9/4/91);

b) In *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991), the Governor, Secretary of State, and Members of the Hamilton County Board of Elections conceded that the at-large election of Hamilton County Municipal Court Judges unlawfully diluted minority voting strength under S2 of the Voting Rights Act;

c) The 1991 apportionment plan resulted in only four (4) majority-minority districts in Ohio, three (3) of which were in Cuyahoga County;[72]

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[69] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 5-6; Curriculum Vitae of Dr. Gary King, Defendants' Exhibit 85.

[70] Deposition of Dr. Gary King, Deefndants' Exhibit 95, p. 40; Defendants' Exhibits 91 and 93.

[71] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 44.

[72] Defendants' Exhibit 17.

d) Until 1991, when the Republicans constituted a majority of persons responsible for apportionment, minorities did not effectively participate in the state apportionment process; [73]

e) No minority candidate has ever been elected to a partisan statewide office in Ohio,[74] but a minority candidate, Robert Duncan, was elected to the Ohio Supreme Court several decades earlier. Candidates for judicial office in Ohio run in a partisan primary, but on a non-partisan ballot in the general election.

f) There is governmental discrimination based on governmental apathy to the interests of the black community.[75]

g) Many public witnesses in the public hearings urged the persons responsible for apportionment to maintain and enhance majority-minority and influence districts throughout the state. These witnesses included:

1. James Mitchell, Black Elected Suburban Officials (August 28, 1991, p. 24);
2. Dana Madison, Executive Director of the Black Elected Democrats of Ohio (BEDO), (August 29, 1991, p. 37);
3. Dr. Gordon Welty, Wright State University (August 29, 1991, p. 20);
4. Jerry Hammond, former President of Columbus City Council (September 7, 1991, pp. 48-49);

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[73] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 95.

[74] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 41.

[75] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 31.

5. Samuel Gresham, Columbus Urban League (September 7, 1991, p. 61);

6. Mark Bradley, People's Coalition For Voter Participation (September 7, 1991, p. 61);

7. Wayne West, Young Black Democrats (September 7, 1991, p. 67);

8. Cathy Mock, President, Young Black Democrats (September 7, 1991, p. 109).

h) Both the NAACP and BEDO have taken the position that the persons responsible for apportionment must create majority-minority districts wherever possible and must maintain and enhance existing minority districts.[76]

90. There exists significant racially polarized voting throughout the State of Ohio.[77]

91. Minorities have experienced racial barriers to effective participation in the democratic process in Ohio. Examples include:

a) There is no consistent system of open primaries in the Democratic party. Endorsements and screening processes present barriers to minority candidates;[78]

b) Minorities receive no significant financial support from the State Democratic Party;[79]

c) "Electability" of blacks present further barriers to effective participation of blacks in primaries;[80]

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[76] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 47; Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 42-50.

[77] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 45.

[78] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 25-27.

[79] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 28.

[80] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 29.

d) Campaign financing and party endorsement pose effective racial barriers to black participation in the Democratic primary system.[81]

92. Minorities in Ohio bear the effects of discrimination in education, employment, and health which hinder their ability to participate effectively in the political process.

a) Blacks experience a significantly higher unemployment rate in Ohio and significantly less opportunity for professional employment. This occurs throughout the state and every major urban area in Ohio. Specifically, in 1990, the unemployment rate for white males was 4.6% but 16.6% for black males. Total unemployment for whites was 4.6% but 14.2% for blacks. Unemployment for whites, ages 16 to 19, was 11.6% but 40.4% for blacks, ages 16 to 19. The unemployment rate for blacks was 13.6% in Cincinnati, 17.3% in Cleveland, 6.8% in Columbus and 10.6% in Dayton—all significantly higher than whites. Similar statistics apply in 1988 and 1989; [82]

b) Minority voter turnout in Cleveland is extremely low due to minority frustration and apathy; [83]

c) The geographical displays of minority population concentrations indicate past discrimination in housing; [84]

d) Blacks are less mobile and less able to obtain housing due to past housing discrimination practices; [85]

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[81] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 23, 24.

[82] Defendants' Exhibits 64, 65 and 66; Deposition of James R. Tilling, Defendants' Exhibit 96, p. 97. *See also*, Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 36.

[83] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 52.

[84] Defendants' Exhibits 26, 30, 34, 38, 42, 46 and 50.

[85] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 37.

e) There are numerous reported cases in Ohio and in the Sixth Circuit finding minority discrimination in police and fire departments, in education, in housing, in elections, in state contracting, in employment and in zoning practices; [86]

f) School systems operate under desegregation orders in major urban areas in Ohio; [87]

g) As indicated by Mr. Tilling's participation on the Joint Select Committee on School Desegregation in the General Assembly (unanimously supported by Republicans), the effects of school desegregation in education in Ohio persist; [88]

h) The school system in Dayton and the police department are subject to desegregation orders; [89]

i) In 1981, the Democrats effectively precluded minority Senator Morris Jackson's participation in drawing district lines; [90]

j) In the early 1980's, Democrats foreclosed Senator Jackson's participation as a delegate to the Democratic National Convention.[91]

93. Political campaigns in Ohio have been characterized by overt or subtle racial appeal.

a) There is a recognition in state Democratic politics that people do not vote for blacks solely because of their race; [92]

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[86] Defendants' Exhibit 66.

[87] Defendants' Exhibit 66.

[88] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 96, 97.

[89] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 34.

[90] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 98.

[91] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 98.

[92] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 32.

b) Racial appeals exist in political campaigns as evidenced by prominent pictures of black candidates to reinforce the perception that the candidate is black; [93]

c) Opponents in campaigns raise the issue of "welfare" whenever a black candidate runs for office; [94]

d) Racial appeals exist in local races in Montgomery County. Higher voter turnout occurs when a black candidate runs for office; [95]

e) In 1980, Floyd Johnson ran against Ed Orlett, the endorsed candidate, in a primary for a house seat in Montgomery County. Mr. Johnson received virtually all of the black vote and insufficient white vote to gain the seat; [96]

f) Race plays a key role in politics in Central Ohio. Former President of City Council Jerry Hammond cited the Frances-Lashutka race for Columbus' City Attorney and the Moody-Rosemond races for Mayor; [97]

g) James Tilling, based on his experience in the Senate campaigns, testified that subtle or overt racial appeals have been made in numerous elections, citing the Forbes-Bonnano race in Cuyahoga County, the C.J. Thomas-Ike Thompson race, Virgil Browns' race for Secretary of State, Carl Stokes' race for Mayor in Cleveland, the Lashutka-Francis race for Columbus City Attory, the Moody-Francis race for Columbus

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[93] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 65-66.

[94] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 65-66.

[95] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 23.

[96] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 11, 29.

[97] Testimony of Jerry Hammond, September 7, 1991, pp. 48-49.

Mayor and the Lashutka-Esp race for Columbus Mayor.[98]

E. Roll Call Analysis

94. Defendants' Exhibit 62 is a roll call analysis prepared by James R. Tilling. The analysis indicates strong Republican support for bills of interest to minorities. Absent Republican support in the Senate, the bills would never have been passed.[99]

VI. PARTISAN BIAS

95. Dr. Gary King, Defendants' expert, conducted an analysis of the partisan bias in the 1991 apportionment plan, Apportionment Plan (the "Tilling Plan"), the 1991 Democrats' Plan and the 1991 plan submitted by the Ohio Republican Party.[100]

96. Dr. King performed this analysis based on district and precinct level data for Ohio House and Senate elections.[101]

97. Dr. King conducted the analysis of partisan bias by use of a seats/vote curve, a methodology standardly accepted in the field for over 100 years.[102]

98. Partisan bias is measured by partisan symmetry. Partisan symmetry provides that political parties are treated fairly in the electoral system if votes are symmetrical to the number of seats awarded in an election.[103]

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[98] Deposition of James Tilling, November 20, 1991, pp. 195-198.

[99] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 114-126.

[100] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 14, 27, 32-38.

[101] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 7.

[102] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 13-14.

[103] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 16.

99. The seats/votes curve methodolgy is a regression methodology. Dr. King conducted a regression analysis and then calculated the variance around the seats/votes curve with standard deviations.[104]

100. The analysis of the 1971 and 1981 apportionment plans prepared by the Democrats in prior apportionments for the Ohio House indicates that the 1971 and 1981 apportionment plans were heavily biased in favor of the Democrats.[105]

101. The 1971 apportionment prepared by the Democrats has been characterized as the most partisan plan ever recorded in the political science literature. The 1981 apportionment plan prepared by the Democrats is also significantly biased in favor of the Democrats.[106]

102. Dr. King's analysis of the four plans in question for the Ohio House indicates that both the 1981 apportionment plan and the 1991 plan proposed by Plaintiffs Ferguson and Quilter are heavily biased in favor of the Democrats. The 1991 plan offered by the Ohio Republican Party is biased in favor of the Republicans. However, the 1991 Apportionment Plan (the "Tilling Plan") is not biased in favor of any political party.[107]

103. The results of Dr. King's analysis indicates that the 1991 Apportionment Plan reflects an average partisan bias of only -0.006, less than the standard error of .011.[108]

104. Dr. King's analysis of the plans for the Ohio Senate indicate that the 1981 Apportionment Plan can-

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[104] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 20-21.

[105] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 28-30; Defendants' Exhibit 88.

[106] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 7, 9.

[107] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 33-34; Defendants' Exhibit 90.

[108] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 35.

not be statistically distinguished from zero partisan bias.[109]

105. The results of Dr. King's regression analysis indicates that the 1991 Apportionment Plan is statistically indistinguishable from zero partisan bias for both the Ohio House and Senate and consequently is not a partisan gerrymandered plan.[110]

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[109] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 37; Defendants Exhibit 91.

[110] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 34, 37.

APPENDIX A

DEFENDANT'S EXHIBIT 2

1981 OHIO HOUSE DISTRICTS

BEST AV

APPENDIX B

DEFENDANT'S EXHIBIT 3

1981 OHIO SENATE DISTRICTS

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APPENDIX C

DEFENDANT'S EXHIBIT 4

1981 APPORTIONMENT MAJORITY NEW HOUSE DISTRICTS FOR OHIO GENERAL ASSEMBLY

BEST AVA

APPENDIX D

DEFENDANT'S EXHIBIT 5

1991 APPORTIONMENT MAJORITY NEW SENATE DISTRICTS FOR OHIO GENERAL ASSEMBLY

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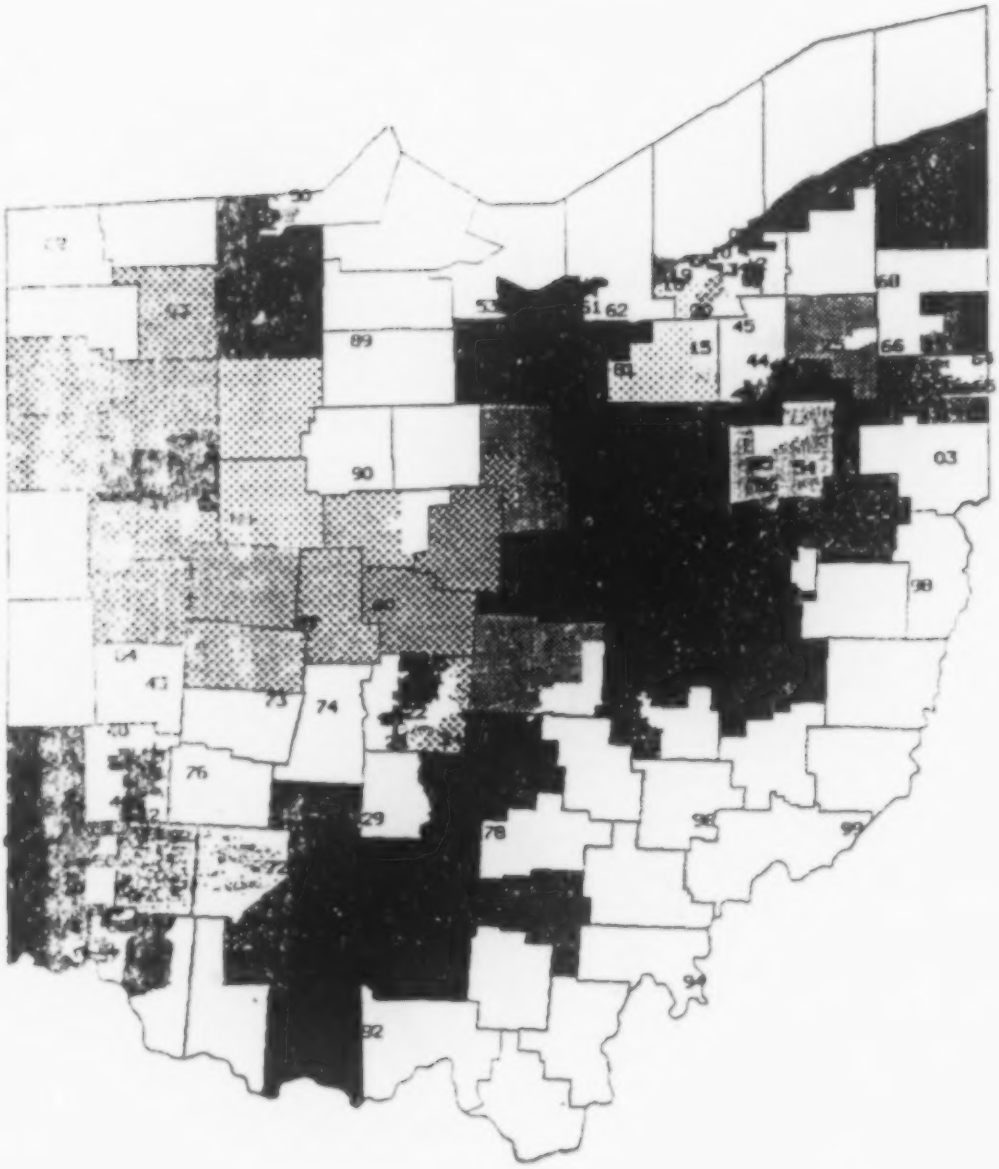
APPENDIX E

DEFENDANT'S EXHIBIT 6

1991 MAJORITY APPORTIONMENT HOUSE DISTRICTS



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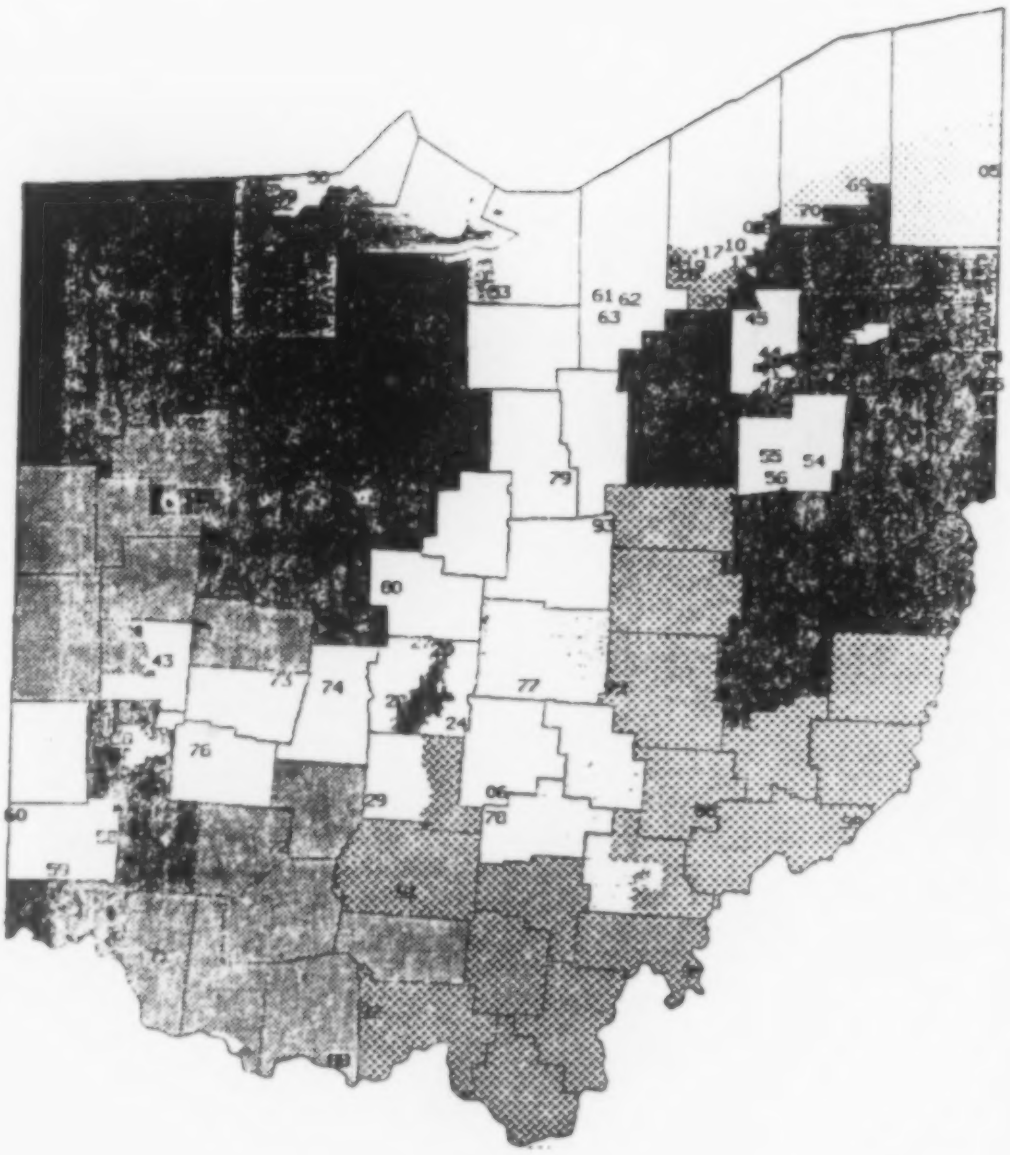
APPENDIX F

DEFENDANT'S EXHIBIT 7

1991 MAJORITY APPORTIONMENT SENATE DISTRICTS



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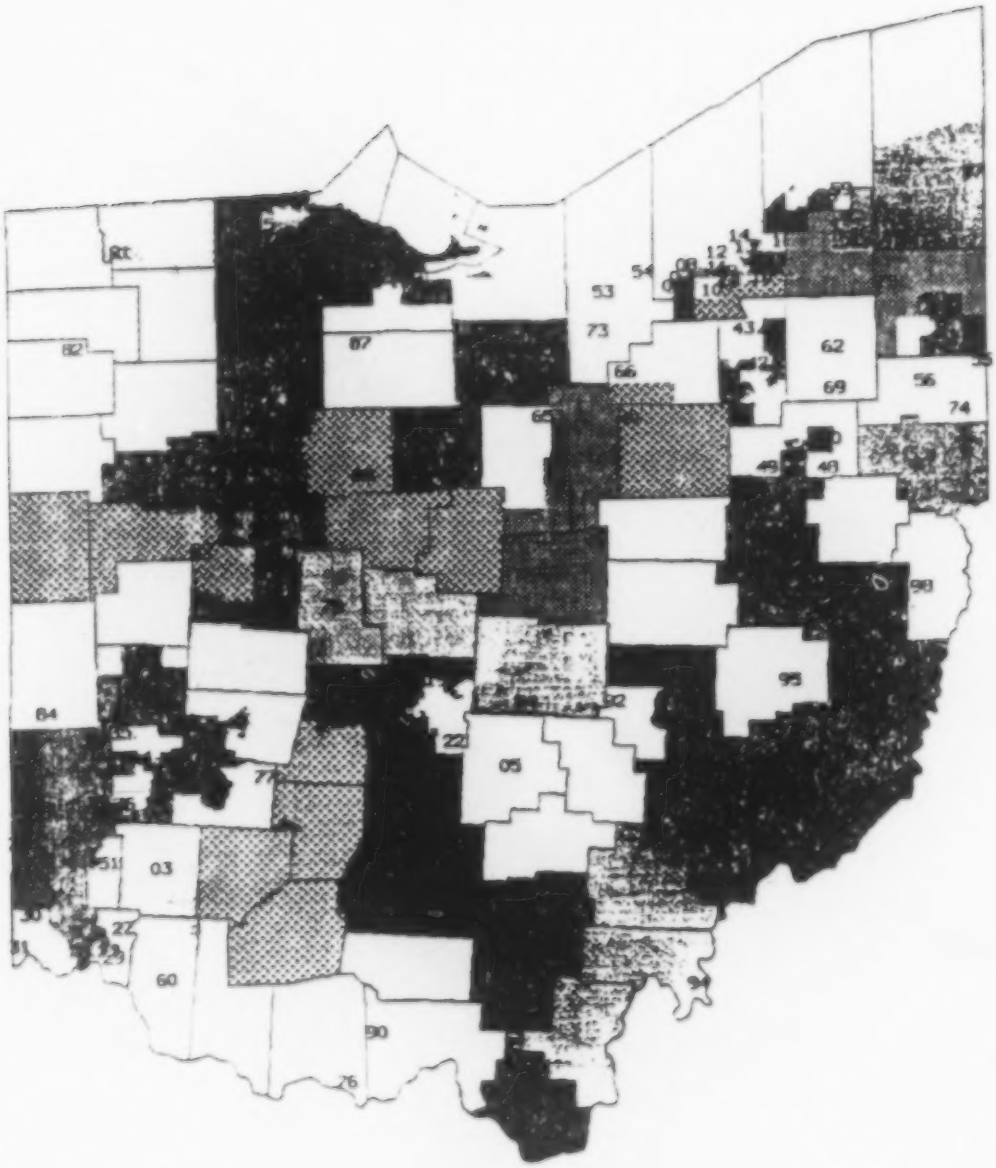
APPENDIX G

DEFENDANT'S EXHIBIT 8

1991 MINORITY APPORTIONMENT HOUSE DISTRICTS



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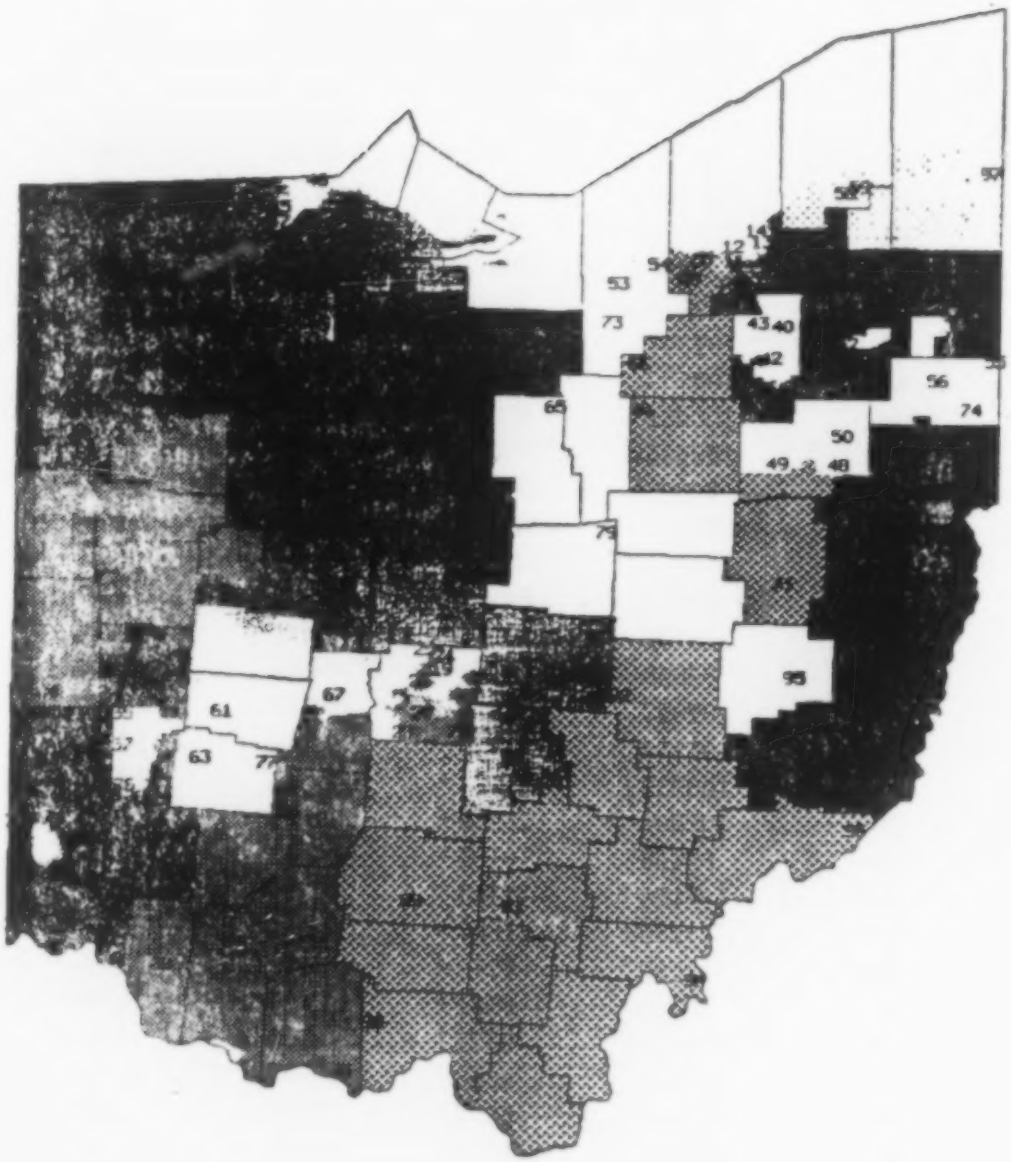
APPENDIX H

DEFENDANT'S EXHIBIT 9

1991 MINORITY APPORTIONMENT SENATE DISTRICTS



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APPENDIX I

DEFENDANT'S EXHIBIT 57

12/06/91

1981 APPORTIONMENT HOUSE DISTRICTS
WITH 1990 POPULATION

District	Population	Deviation	Percent Black	Percent Black VAP
01	109755	188	11.22	10.07
02	99821	−9746 *	3.14	2.81
03	108276	−1291	1.30	1.23
04	122354	12787 *	0.69	0.65
05	113269	3702	1.03	1.10
06	113674	4107	0.47	0.44
07	107304	−2263	2.41	2.00
08	100798	−8769 *	2.19	1.91
09	100461	−9106 *	4.28	3.59
10	108686	−881	0.62	0.51
11	96086	−13481 *	4.67	3.54
12	84098	−25469 *	75.25	71.63
13	104883	−4684	5.00	4.39
14	91972	−17595 *	90.39	88.45
15	99173	−10394 *	35.14	31.56
16	96258	−13309 *	94.92	94.23
17	107097	−2470	26.14	24.45
18	101314	−8253 *	14.83	13.88
19	100333	−9234 *	14.45	12.89
20	122802	13235 *	8.93	6.72
21	99465	−10102 *	7.53	5.85
22	108124	−1443	12.67	11.27
23	97630	−11937 *	46.07	39.78
24	102789	−6778 *	32.37	29.20
25	99765	−9802 *	53.34	49.58
26	119239	9672 *	2.73	2.46
27	116413	6846 *	12.26	10.82
28	116369	6802 *	5.95	5.24
29	106537	−3030	38.73	35.00
30	118913	9346 *	12.50	10.83
31	97764	−11803 *	46.98	42.49

District	Population	Deviation	Percent Black	Percent Black VAP
32	111070	1503	26.76	25.19
33	115186	5619	4.16	3.55
34	138011	28444 *	5.12	4.81
35	157601	48034 *	1.45	1.37
36	115907	6340 *	42.20	39.75
37	108769	−798	36.29	32.76
38	116087	6520 *	0.92	0.83
39	106321	−3246	4.71	3.65
40	118434	8867 *	6.22	5.57
41	107879	−1688	2.32	1.97
42	105536	−4031	35.53	32.01
43	108031	−1536	2.87	2.52
44	113743	4176	9.05	8.11
45	107825	−1742	41.95	37.61
46	108701	−866	5.37	4.45
47	102736	−6831 *	13.41	11.36
48	121371	11804 *	2.80	2.58
49	107339	−2228	4.46	3.98
50	104311	−5256 *	14.98	12.93
51	116672	7105 *	1.31	1.17
52	102329	−7238 *	10.66	9.52
53	98900	−10667 *	28.05	23.94
54	104411	−5156	7.73	6.77
55	99153	−10414 *	10.31	8.79
56	122892	13325 *	4.80	4.25
57	132647	23080 *	4.74	4.39
58	98904	−10663 *	2.37	2.32
59	97194	−12373 *	12.87	11.15
60	102963	−6604 *	1.04	1.01
61	112536	2969	2.18	1.98
62	110506	939	11.41	10.46
63	116110	6543 *	3.20	3.02
64	97795	−11772 *	9.98	9.45
65	111280	1713	8.33	8.66
66	125986	16419 *	0.93	0.86
67	109365	−202	1.68	1.58
68	113941	4374	1.57	1.43
69	106276	−3291	7.51	5.94

District	Population	Deviation	Percent Black	Percent Black VAP
70	102238	−7329 *	6.05	5.19
71	102840	−6727 *	4.02	3.55
72	103861	−5706 *	3.40	3.47
73	117203	7636 *	1.08	1.14
74	112844	3277	1.26	1.21
75	112214	2647	1.88	1.84
76	112125	2558	0.92	0.82
77	120266	10699 *	1.06	1.02
78	122386	12819 *	1.25	1.39
79	114804	5237	0.53	0.49
80	113879	4312	0.53	0.41
81	110715	1148	0.60	0.57
82	114875	5308	0.75	0.71
83	115397	5830 *	3.95	4.41
84	127068	17501 *	1.92	2.33
85	106082	−3485	2.55	2.20
86	102142	−7425 *	2.68	2.88
87	126643	17076 *	2.10	2.22
88	117585	8018 *	6.38	7.65
89	104576	−4991	2.66	2.98
90	104110	−5457 *	0.82	0.75
91	107881	−1686	3.19	2.96
92	103162	−6405 *	1.73	1.65
93	112658	3091	1.41	1.29
94	113490	3923	2.40	2.45
95	107300	−2267	1.01	1.00
96	107725	−1842	1.54	1.48
97	110611	1044	0.69	0.66
98	96383	−13184 *	5.06	4.60
99	97907	−11660 *	1.36	1.26

APPENDIX J

DEFENDANT'S EXHIBIT 93

District Report for Plan 'planrepo' House
Wed Dec 4 11:09:37 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	109755	11.22	10.07	1.13	1.00
02	113908	2.12	2.56	0.46	0.42
03	108275	1.30	1.23	0.37	0.30
04	113269	1.03	1.10	2.54	2.07
05	99821	3.14	2.81	1.54	1.19
06	103451	1.11	1.30	0.47	0.41
07	101441	1.53	1.40	0.42	0.35
08	104972	65.64	61.41	0.73	0.70
09	108572	62.30	58.36	0.86	0.84
10	105514	67.35	63.42	3.01	2.69
11	104799	43.01	40.61	0.92	0.83
12	105423	67.25	65.13	0.58	0.51
13	114859	2.85	2.32	10.95	8.82
14	112432	7.92	6.86	0.69	0.64
15	109713	3.29	3.25	0.65	0.60
16	106959	0.47	0.45	0.93	0.80
17	114174	2.75	2.34	4.96	3.93
18	108566	1.41	1.31	1.01	0.86
19	114955	4.63	3.71	2.10	1.76
20	113210	0.31	0.23	0.73	0.65
21	106606	55.92	50.30	1.04	1.02
22	104981	48.29	44.31	0.90	0.82
23	113429	8.32	7.78	0.97	0.98
24	108120	4.22	3.92	0.82	0.73
25	110612	8.41	7.96	0.93	0.87
26	105961	8.66	8.07	1.16	1.07
27	107162	3.57	3.09	0.97	0.90
28	111463	4.32	3.56	0.97	0.90
29	110026	3.75	4.47	0.92	0.92
30	106538	61.07	56.83	0.75	0.75

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
31	104614	59.82	52.60	0.64	0.65
32	104424	24.00	21.58	0.71	0.64
33	114073	8.04	7.50	0.52	0.50
34	104898	2.14	1.90	0.38	0.31
35	107202	8.96	7.91	0.66	0.54
36	111217	4.49	4.08	0.54	0.47
37	113258	2.14	1.94	0.61	0.53
38	104811	54.78	50.70	0.70	0.67
39	104426	32.35	29.23	0.87	0.78
40	106008	3.30	2.84	0.47	0.39
41	111245	1.31	1.18	0.68	0.62
42	108612	2.76	2.28	0.96	0.85
43	110863	3.86	3.61	0.79	0.71
44	105502	43.26	39.52	0.81	0.76
45	108806	6.00	5.40	0.59	0.50
46	106690	1.33	1.12	0.50	0.45
47	113164	6.29	5.00	0.53	0.47
48	109221	0.61	0.53	0.45	0.38
49	104394	50.92	47.65	5.44	4.38
50	113497	5.46	4.23	4.71	3.62
51	113494	2.40	2.18	1.50	1.25
52	109245	5.65	4.85	1.94	1.55
53	111136	6.07	5.24	2.90	2.38
54	108609	15.15	12.93	0.99	0.91
55	107746	3.84	3.39	0.82	0.77
56	111966	1.20	1.15	0.54	0.50
57	113515	2.98	2.64	0.46	0.40
58	107036	5.57	5.15	0.51	0.46
59	110810	5.30	4.67	0.55	0.49
60	113744	1.26	1.33	0.37	0.33
61	114270	15.91	13.81	11.57	9.43
62	113456	2.51	2.46	1.28	1.08
63	114683	0.63	0.60	1.25	1.00
64	106167	35.53	31.19	4.22	3.46
65	110906	1.64	1.48	1.13	0.93
66	104431	11.95	10.32	0.67	0.56
67	104513	2.38	2.36	0.68	0.60
68	99997	1.31	1.28	0.34	0.28

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
69	105926	2.29	2.07	0.83	0.73
70	108176	0.99	0.96	0.54	0.50
71	110472	0.93	0.84	0.51	0.47
72	110095	1.26	1.25	0.30	0.25
73	107159	11.86	10.76	0.59	0.49
74	108069	4.04	4.63	0.71	0.63
75	113458	3.27	3.08	0.60	0.54
76	106118	7.85	8.18	1.11	0.99
77	113885	1.90	1.78	0.50	0.42
78	114456	1.45	1.62	0.52	0.50
79	110517	8.91	8.46	0.73	0.62
80	110297	1.47	1.29	0.47	0.38
81	110339	0.76	0.71	0.59	0.52
82	114784	0.53	0.49	4.65	3.76
83	113878	0.53	0.41	3.39	2.72
84	114085	0.31	0.31	0.62	0.49
85	107290	1.53	1.51	0.50	0.43
86	114875	0.75	0.71	1.70	1.42
87	111458	3.29	3.81	0.55	0.52
88	112813	1.53	1.50	0.32	0.29
89	111876	2.43	2.10	4.53	3.68
90	107033	1.21	1.04	0.70	0.58
91	111012	4.30	4.92	0.44	0.43
92	112148	3.01	3.25	0.29	0.25
93	107335	0.90	0.81	0.73	0.56
94	114183	1.67	1.66	0.33	0.28
95	111796	0.88	0.90	0.31	0.25
96	114762	4.01	3.64	0.34	0.29
97	110909	0.96	0.91	0.30	0.24
98	107939	4.66	4.26	0.45	0.43
99	113348	1.21	1.14	0.26	0.23
Averages	109516	10.92	10.07	1.27	1.08

District Report for Plan 'planrepo' Senate
Wed Dec 4 11:08:28 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	343538	0.60	0.54	3.25	2.62
02	337899	3.15	2.82	2.31	1.90
03	324694	7.10	6.69	0.97	0.89
04	331592	4.01	3.64	0.47	0.42
05	320101	29.83	27.72	0.79	0.72
06	325866	2.44	2.07	0.71	0.62
07	338385	2.91	2.86	0.54	0.47
08	326174	6.45	5.83	0.52	0.45
09	315577	48.39	43.74	0.70	0.68
10	321346	7.91	7.85	0.80	0.70
11	327138	20.03	17.57	4.02	3.11
12	331131	4.32	3.97	0.75	0.64
13	342410	6.35	5.63	4.70	3.84
14	333381	1.24	1.20	0.38	0.33
15	325017	36.85	33.08	0.97	0.95
16	328651	3.88	3.70	0.95	0.90
17	337343	2.98	3.27	0.35	0.32
18	313924	2.12	1.91	0.96	0.79
19	328150	3.79	3.57	0.64	0.52
20	339907	2.05	1.91	0.30	0.26
21	319058	65.07	60.99	1.53	1.38
22	321495	1.86	1.83	0.56	0.49
23	343989	3.41	2.80	6.01	4.77
24	328736	0.73	0.66	0.88	0.77
25	322655	38.70	36.05	0.73	0.66
26	330368	2.32	2.33	1.95	1.60
27	328661	4.59	3.89	0.54	0.47
28	328182	15.24	13.73	0.62	0.56
29	328322	6.68	5.80	0.78	0.72
30	327125	2.29	2.14	0.38	0.32
31	331793	1.50	1.58	0.50	0.45
32	308942	5.27	4.73	0.57	0.49
33	330589	12.98	11.26	1.89	1.55
Averages	328550	10.82	9.92	1.27	1.07

House to Senate Assignments

Senate	House
01:	82, 83, 86
02:	04, 51, 53
03:	24, 25, 26
04:	58, 59, 60
05:	38, 39, 43
06:	40, 41, 42
07:	02, 36, 37
08:	33, 34, 35
09:	30, 31, 32
10:	73, 74, 76
11:	49, 50, 52
12:	01, 84, 85
13:	61, 62, 63
14:	71, 72, 88
15:	21, 22, 23
16:	27, 28, 29
17:	91, 92, 94
18:	05, 69, 70
19:	79, 80, 93
20:	95, 96, 99
21:	08, 09, 10
22:	07, 15, 81
23:	13, 17, 19
24:	16, 18, 20
25:	11, 12, 14
26:	87, 89, 90
27:	45, 46, 47
28:	44, 48, 75
29:	54, 55, 56
30:	03, 97, 98
31:	06, 77, 78
32:	66, 67, 68
33:	57, 64, 65

APPENDIX K

DEFENDANT'S EXHIBIT 94

District Report for Plan 'demo0930' House
Wed Dec 4 11:11:19 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	109755	11.22	10.07	1.13	1.00
02	108275	1.30	1.23	0.37	0.30
03	113908	2.12	2.56	0.46	0.42
04	113269	1.03	1.10	2.54	2.07
05	103451	1.11	1.30	0.47	0.41
06	113673	0.47	0.44	0.96	0.82
07	107260	2.62	2.19	1.42	1.20
08	114135	1.23	1.16	1.74	1.46
09	108063	6.05	5.14	1.86	1.57
10	109506	0.66	0.49	0.86	0.75
11	105670	8.54	7.32	15.82	13.22
12	104891	70.81	67.08	2.36	2.13
13	104758	63.86	60.18	0.82	0.79
14	105877	68.20	63.71	0.75	0.75
15	112720	27.89	26.46	0.91	0.81
16	106269	69.17	66.67	0.57	0.52
17	112526	3.12	2.97	0.62	0.59
18	106785	6.87	6.03	0.69	0.64
19	104912	50.80	46.40	1.02	0.95
20	111747	12.45	10.88	1.28	1.25
21	105539	53.85	50.60	0.89	0.84
22	107890	7.04	6.61	0.87	0.82
23	107563	4.79	4.15	0.73	0.66
24	114746	5.08	4.78	0.90	0.80
25	114655	1.62	1.49	0.99	0.93
26	109984	5.99	5.23	1.11	1.02
27	114704	3.46	3.11	0.65	0.57
28	104246	61.26	57.91	0.63	0.59
29	109991	2.53	2.30	0.59	0.52
30	112793	3.96	3.26	0.41	0.35

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
31	105394	4.39	3.55	0.51	0.48
32	107674	18.46	16.71	0.58	0.51
33	105690	55.49	47.10	0.78	0.81
34	105731	21.67	19.55	0.67	0.58
35	106995	4.23	3.62	0.89	0.79
36	104213	47.63	45.26	0.48	0.42
37	104544	40.79	36.20	0.88	0.81
38	114880	1.09	0.99	0.82	0.75
39	114603	3.21	2.71	1.00	0.89
40	111432	2.54	2.24	0.56	0.49
41	113674	4.25	3.81	0.54	0.47
42	104890	47.20	43.09	0.81	0.76
43	110906	2.88	2.54	0.52	0.45
44	114864	3.34	3.02	1.60	1.32
45	104278	50.12	44.98	2.77	2.32
46	111845	5.73	4.70	2.51	1.98
47	109644	5.22	4.16	6.67	5.05
48	114941	3.52	3.08	0.63	0.56
49	111681	3.84	3.43	0.72	0.68
50	113964	14.49	12.49	0.97	0.90
51	107036	5.57	5.15	0.51	0.46
52	111635	5.27	4.63	0.55	0.49
53	104733	9.77	8.31	12.58	10.28
54	105133	7.69	6.73	1.39	1.17
55	106167	35.53	31.19	4.22	3.46
56	114523	1.60	1.44	1.11	0.93
57	114568	2.31	2.27	0.71	0.62
58	108645	1.01	0.97	0.53	0.49
59	106854	2.27	2.07	0.84	0.73
60	105632	1.01	0.94	0.48	0.44
61	104588	11.96	10.92	0.74	0.60
62	106173	3.44	3.23	0.62	0.55
63	111280	8.33	8.66	1.11	1.00
64	114756	1.90	1.78	0.50	0.42
65	108616	8.95	8.47	0.77	0.65
66	112987	0.74	0.69	0.60	0.52
67	109949	2.30	2.06	0.73	0.66
68	113700	1.63	1.48	0.35	0.29

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
69	110497	0.98	0.81	0.46	0.39
70	105119	5.85	5.01	3.54	2.92
71	111087	0.74	0.71	0.31	0.26
72	112919	1.27	1.33	0.36	0.33
73	108078	3.32	3.40	1.04	0.91
74	110771	10.95	9.47	0.59	0.51
75	114838	1.27	1.22	0.38	0.32
76	104891	0.64	0.65	0.33	0.28
77	104429	1.78	1.76	0.55	0.50
78	112438	2.34	2.47	0.46	0.40
79	112500	0.97	0.89	0.38	0.30
80	110827	1.42	1.30	0.41	0.34
81	114804	0.53	0.49	4.65	3.76
82	113878	0.53	0.41	3.39	2.72
83	111142	0.76	0.69	0.58	0.47
84	106587	0.76	0.72	0.53	0.43
85	111842	0.78	0.74	1.66	1.39
86	110792	3.69	4.24	0.38	0.38
87	108293	2.48	2.14	4.14	3.31
88	114276	2.44	2.62	0.65	0.57
89	113349	6.60	7.91	0.58	0.62
90	104575	2.66	2.98	0.32	0.28
91	104110	0.82	0.75	1.20	0.98
92	107880	3.19	2.96	0.31	0.27
93	107397	1.68	1.61	0.26	0.23
94	113490	2.40	2.45	0.58	0.54
95	107300	1.01	1.00	0.33	0.27
96	107724	1.54	1.48	0.32	0.26
97	112699	2.94	2.67	1.40	1.08
98	106819	4.33	3.98	0.49	0.46
99	112076	1.52	1.40	0.25	0.22
Averages	109554	10.94	10.07	1.30	1.10

District Report for Plan 'demo0930' Senate
Wed Dec 4 11:13:39 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	340524	0.61	0.55	3.25	2.62
02	333252	3.35	2.98	2.53	2.08
03	339350	3.01	2.77	0.87	0.80
04	331592	4.01	3.64	0.47	0.42
05	315753	30.66	28.21	0.75	0.68
06	343183	1.98	1.72	0.73	0.65
07	338604	2.70	2.66	0.57	0.50
08	325863	8.89	7.79	0.50	0.44
09	315668	46.07	41.57	0.69	0.66
10	320297	7.38	7.15	0.81	0.71
11	325768	19.77	17.43	3.99	3.11
12	327486	4.26	3.89	0.75	0.64
13	317945	6.89	6.10	4.96	4.05
14	321316	1.81	2.01	0.40	0.37
15	322199	38.50	34.50	1.07	1.03
16	325437	5.94	5.33	0.91	0.84
17	325322	3.71	4.29	0.39	0.38
18	328198	2.08	1.89	0.93	0.77
19	328417	3.62	3.48	0.49	0.41
20	329096	2.38	2.30	0.41	0.37
21	315527	67.62	63.61	1.31	1.21
22	334902	0.96	0.89	0.44	0.38
23	327869	5.17	4.35	6.31	5.01
24	330440	1.23	1.02	1.07	0.92
25	331516	32.72	30.95	0.71	0.64
26	326680	1.94	1.87	1.98	1.61
27	327229	16.97	15.10	0.63	0.56
28	330345	2.90	2.63	0.54	0.47
29	340587	7.30	6.32	0.77	0.71
30	327171	2.36	2.19	0.37	0.33
31	330645	1.80	1.86	0.48	0.41
32	336193	3.40	3.20	0.59	0.53
33	331462	15.59	13.46	1.93	1.59
Averages	328662	10.84	9.93	1.29	1.09

House to Senate Assignments

Senate	House
01:	81, 82, 85
02:	04, 44, 70
03:	24, 25, 67
04:	51, 52, 72
05:	35, 36, 37
06:	38, 39, 68
07:	03, 27, 29
08:	30, 31, 32
09:	28, 33, 34
10:	61, 63, 77
11:	45, 46, 47
12:	01, 83, 84
13:	53, 54, 73
14:	60, 76, 86
15:	19, 20, 21
16:	22, 23, 26
17:	89, 90, 93
18:	58, 59, 97
19:	65, 79, 95
20:	92, 94, 96
21:	12, 13, 14
22:	66, 71, 80
23:	08, 09, 11
24:	06, 07, 10
25:	15, 16, 17
26:	87, 88, 91
27:	40, 42, 43
28:	41, 62, 69
29:	48, 49, 50
30:	02, 98, 99
31:	05, 64, 78
32:	18, 57, 75
33:	55, 56, 74

APPENDIX L

DEFENDANT'S EXHIBIT 54

12/04/91

1981 SENATE DISTRICTS WITH 1990 CENSUS POPULATION

District	Population	Black Percent	Percent Black VAP	Percent Hispanic	Percent Hispanic VAP
01	343558	0.60	0.54	3.25	2.62
02	336877	3.19	2.86	2.33	1.91
03	422255	2.84	2.74	0.76	0.69
04	372743	3.61	3.29	0.50	0.44
05	341144	14.25	12.99	0.69	0.61
06	338315	16.25	14.75	0.77	0.69
07	362720	5.51	5.15	0.59	0.52
08	330392	9.73	7.96	0.51	0.45
09	300184	43.79	39.56	0.65	0.63
10	334001	7.18	6.95	0.75	0.66
11	319262	20.31	17.96	4.08	3.18
12	335867	5.22	5.05	0.73	0.64
13	307425	7.10	6.28	5.07	4.13
14	350828	1.49	1.56	0.37	0.33
15	320670	29.35	25.76	1.03	0.97
16	345169	14.30	13.02	0.96	0.92
17	334237	3.59	4.05	0.47	0.47
18	315320	2.11	1.91	0.95	0.79
19	322578	3.84	3.63	0.53	0.44
20	312932	1.30	1.25	0.30	0.25
21	275243	65.85	61.86	1.63	1.47
22	334335	10.20	9.65	0.66	0.58
23	297346	3.70	3.01	6.70	5.33
24	329664	1.15	0.97	1.03	0.89
25	297906	40.58	37.57	0.72	0.67
26	312334	2.02	1.94	2.28	1.86
27	327310	15.55	13.99	0.64	0.58
28	330265	4.30	3.60	0.52	0.45
29	328322	6.68	5.80	0.78	0.72
30	315270	2.24	2.09	0.38	0.33
31	339632	2.01	1.95	0.42	0.36
32	308942	5.27	4.73	0.57	0.49
33	304069	14.07	12.17	2.02	1.65
*** Total ***					
	10847115				

APPENDIX M

DEFENDANT'S EXHIBIT 55

District Report for Plan 'planrepo' Senate
Mon Dec 2 10:48:38 1991

Target Population = 0

District	% Black	% Black VAP	% Hisp	% Hisp VAP
01	0.60	0.54	3.25	2.62
02	3.15	2.82	2.31	1.90
03	7.10	6.69	0.97	0.89
04	4.01	3.64	0.47	0.42
05	29.83	27.72	0.79	0.72
06	2.44	2.07	0.71	0.62
07	2.91	2.86	0.54	0.47
08	6.45	5.83	0.52	0.45
09	48.39	43.74	0.70	0.68
10	7.91	7.85	0.80	0.70
11	20.03	17.57	4.02	3.11
12	4.32	3.97	0.75	0.64
13	6.35	5.63	4.70	3.84
14	1.24	1.20	0.38	0.33
15	36.85	33.08	0.97	0.95
16	3.88	3.70	0.95	0.90
17	2.98	3.27	0.35	0.32
18	2.12	1.91	0.96	0.79
19	3.79	3.57	0.64	0.52
20	2.05	1.91	0.30	0.26
21	65.07	60.99	1.53	1.38
22	1.86	1.83	0.56	0.49
23	3.41	2.80	6.01	4.77
24	0.73	0.66	0.88	0.77
25	38.70	36.05	0.73	0.66
26	2.32	2.33	1.95	1.60
27	4.59	3.89	0.54	0.47
28	15.24	13.73	0.62	0.56
29	6.68	5.80	0.78	0.72
30	2.29	2.14	0.38	0.32
31	1.50	1.58	0.50	0.45
32	5.27	4.73	0.57	0.49
33	12.98	11.26	1.89	1.55
Averages	10.82	9.92	1.27	1.07

House to Senate Assignments

Senate	House
01:	82, 83, 86
02:	04, 51, 53
03:	24, 25, 26
04:	58, 59, 60
05:	38, 39, 43
06:	40, 41, 42
07:	02, 36, 37
08:	33, 34, 35
09:	30, 31, 32
10:	73, 74, 76
11:	49, 50, 52
12:	01, 84, 85
13:	61, 62, 63
14:	71, 72, 88
15:	21, 22, 23
16:	27, 28, 29
17:	91, 92, 94
18:	05, 69, 70
19:	79, 80, 93
20:	95, 96, 99
21:	08, 09, 10
22:	07, 15, 81
23:	13, 17, 19
24:	16, 18, 20
25:	11, 12, 14
26:	87, 89, 90
27:	45, 46, 47
28:	44, 48, 75
29:	54, 55, 56
30:	03, 97, 98
31:	06, 77, 78
32:	66, 67, 68
33:	57, 64, 65

APPENDIX N

DEFENDANT'S EXHIBIT 56

District Report for Plan 'demo0930' Senate
Mon Dec 2 10:40:02 1991

Target Population = 0

District	% Black	% Black V	% Hisp	% Hisp VA
01	0.61	0.55	3.25	2.62
02	3.35	2.98	2.53	2.08
03	3.01	2.77	0.87	0.80
04	4.01	3.64	0.47	0.42
05	30.66	28.21	0.75	0.68
06	1.98	1.72	0.73	0.65
07	2.70	2.66	0.57	0.50
08	8.89	7.79	0.50	0.44
09	46.07	41.57	0.69	0.66
10	7.38	7.15	0.81	0.71
11	19.77	17.43	3.99	3.11
12	4.26	3.89	0.75	0.64
13	6.89	6.10	4.96	4.05
14	1.81	2.01	0.40	0.37
15	38.50	34.50	1.07	1.03
16	5.94	5.33	0.91	0.84
17	3.71	4.29	0.39	0.38
18	2.08	1.89	0.93	0.77
19	3.62	3.48	0.49	0.41
20	2.38	2.30	0.41	0.37
21	67.62	63.61	1.31	1.21
22	0.96	0.89	0.44	0.38
23	5.17	4.35	6.31	5.01
24	1.23	1.02	1.07	0.92
25	32.72	30.95	0.71	0.64
26	1.94	1.87	1.98	1.61
27	16.97	15.10	0.63	0.56
28	2.90	2.63	0.54	0.47
29	7.30	6.32	0.77	0.71
30	2.36	2.19	0.37	0.33
31	1.80	1.86	0.48	0.41
32	3.40	3.20	0.59	0.53
33	15.59	13.46	1.93	1.59
Averages	10.84	9.93	1.29	1.09

House to Senate Assignments

Senate	House
01:	81, 82, 85
02:	04, 44, 70
03:	24, 25, 67
04:	51, 52, 72
05:	35, 36, 37
06:	38, 39, 68
07:	03, 27, 29
08:	30, 31, 32
09:	28, 33, 34
10:	61, 63, 77
11:	45, 46, 47
12:	01, 83, 84
13:	53, 54, 73
14:	60, 76, 86
15:	19, 20, 21
16:	22, 23, 26
17:	89, 90, 93
18:	58, 59, 97
19:	65, 79, 95
20:	92, 94, 96
21:	12, 13, 14
22:	66, 71, 80
23:	08, 09, 11
24:	06, 07, 10
25:	15, 16, 17
26:	87, 88, 91
27:	40, 42, 43
28:	41, 62, 69
29:	48, 49, 50
30:	02, 98, 99
31:	05, 64, 78
32:	18, 57, 75
33:	55, 56, 74

APPENDIX O

DEFENDANT'S EXHIBIT 18

COMPARISON OF HOUSE DISTRICTS WITH BLACK VAP OVER 10% IN 1991 MAJORITY AND MINORITY APPORTIONMENT PLANS

House District	1991 Majority Plan	House District	1991 Minority Plan
12	65.13	12	67.08
10	63.42	16	66.67
8	61.41	14	63.71
9	58.36	13	60.18
30	56.83	28	57.91
31	52.60	21	50.60
38	50.70	33	47.10
21	50.30	19	46.40
49	47.65	36	45.26
22	44.31	45	44.98
11	40.61	42	43.09
44	39.52	37	36.20
64	31.19	55	31.19
39	29.23	15	26.46
32	21.58	34	19.55
61	13.81	32	16.71
54	12.93	50	12.49
73	10.76	61	10.92
66	10.32	20	10.88
1	10.07	1	10.07
TOTAL	20		20

APPENDIX P

DEFENDANT'S EXHIBIT 21

PERCENTAGE POPULATION OF HOUSE DISTRICTS WITH MINORITY REPRESENTATIVES

Current State Representative	1981 House District Number	1981 Percent Black Population	1991 House District Number	1991 Percent Black	Percentage Change
Troy James	12	74.8%	10	67.0%	−7.8
C. J. Prentiss	14	90.1%	8	65.6%	−24.5
Vermel Whalen	16	94.6%	12	67.0%	−27.6
William Mallory	23	45.9%	31	59.7%	+13.8
Helen Rankin	25	53.2%	30	60.9%	+7.7
Ray Miller	29	38.5%	21	55.7%	+17.2
Otto Beatty	31	46.8%	22	48.0%	+1.2
Rhine McLin	36	42.1%	38	54.6%	+12.5
Tom Roberts	37	36.1%	39	32.2%	−3.9
Vernon Sykes	42	35.4%	44	43.0%	+7.6
Casey Jones	45	41.7%	49	50.0%	+8.3

APPENDIX Q

DEFENDANT'S EXHIBIT 59

POLITICAL STRENGTH OF MINORITY INCUMBENTS—1991 APPORTIONMENT PLAN

1981 House District	Incumbent	Political Index	1991 House District	Political Index	Result
12	Troy James	80.15	10	79.04	Strongly Democratic
14	C.J. Prentiss	84.83	8	75.23	Strongly Democratic
16	Vermel Whalen	87.18	12	78.88	Strongly Democratic
23	William Mallory	65.74	31	69.28	Strongly Democratic
25	Helen Rankin	66.74	30	74.68	Strongly Democratic
29	Ray Miller	62.97	21	76.50	Strongly Democratic
31	Otto Beatty	66.33	22	69.35	Strongly Democratic
36	Rhine McLine	64.40	38	75.63	Strongly Democratic
37	Tom Roberts	62.52	39	64.40	Strongly Democratic
42	Vernon Sykes	58.64	44	72.21	Strongly Democratic
45	Casey Jones	64.99	49	77.64	Strongly Democratic

APPENDIX R

DEFENDANT'S EXHIBIT 24

THE BLACK ELECTED DEMOCRATS OF OHIO

37 West Broad Street, Suite 430
Columbus, Ohio 43215
Telephone 614/341-6912

October 1, 1991

Mr. James Tilling, Secretary
Ohio Reapportionment Board
Ohio Senate
Statehouse
Columbus, Ohio 43215

Dear Mr. Tilling:

This will serve as an official letter of support for the amendment offered by Dana Mattison for Cuyahoga County.

Sincerely,

/s/ William L. Mallory
REP WILLIAM L. MALLORY
President

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

[Filed Mar. 10, 1992]

On January 31, 1992, this Court filed its opinion and order holding that there is no legal mandate requiring the creation of majority-minority districts wherever possible in the 1991 Apportionment Plan for the Ohio General Assembly (the Plan). Furthermore, this Court found that the Apportionment Board had not conducted a totality of the circumstances analysis sufficient to establish a violation of the Voting Rights Act and justify the majority-minority districts delineated in the Plan. The Board was ordered to reconsider the Plan and either show justification under the totality of the circumstances test for the majority-minority districts or submit a revised plan.

On February 19, 1992, the Defendants submitted, *inter alia*, the Board's Findings and Conclusions and what they termed a revised apportionment plan which, however, is identical to the Plan except for correction of "technical errors." The Board's Findings include a totality of the circumstances analysis.

After careful review, we find that the Board's totality of the circumstances analysis contains only meager information that was not previously before this Court. Furthermore, the information is not of assistance in answering the "question whether the political processes are 'equally open' ", nor does the analysis constitute the "searching practical evaluation of the 'past and present reality' " contemplated by the legislative history of the 1982 amendments to the Voting Rights Act. S. Rep. No. 417, 97th Cong. 2d Sess. 30. Accordingly, the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965. As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution. "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). It is therefore incumbent on this court to enjoin any election for the Ohio General Assembly until a constitutional plan is submitted by the Special Master and approved by this court.[1] Accordingly, the date of May 5,

[1] The most explicit statement of the power to enjoin state elections appears in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972). The three-judge district court found that the

1992 for the holding of the Ohio primary election is vacated to the extent that candidates for election to the General Assembly are concerned, and the appropriate election officials are enjoined and directed to cause such primary election to be held on June 2, 1992, provided, however, that on proper showing the court may provide an alternate date.

The plan herein above referenced marks the second time that the Apportionment Board has failed to meet the standards mandated by federal law even in the face of clear and unambiguous legal direction from this Court. In this situation it is concluded that exceptional circumstances exist which require the appointment of a Special Master to prepare an acceptable apportionment plan. The Court therefore hereby appoints Lawrence A. Kane, Jr., 1900 Chemed Center, 255 E. 5th St., Cincinnati, Ohio, 45202, as such Special Master, for the purpose of submitting a plan which complies with federal and state law and this Court's January 31 order and opinion. This appointment is made pursuant to Rule 53 of the Federal Rules of Civil Procedure and the master herein appointed is to be sworn to accept the responsibilities and

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act apportioning the Minnesota legislature violated the Constitution, and accordingly, "enjoined the Secretary of State and the county auditors from conducting future elections under the Act, and appointed two Special Masters (a third was named later) to aid the court in formulating a new apportionment plan." *Id.* at 191. The court-ordered plan reduced the number of state legislative districts from 67 to 35. *Id.* at 188.

Although the Court found that the district court erred in so drastically reducing the legislature's size, *id.* at 199, the Court never questioned the power of the district court to reapportion the state legislature, *id.* at 195. The court's opinion also never questioned the power of the district court to postpone the elections: "If time presses too seriously, the District Court has the power appropirately to extend the time limitations imposed by state law." *Id.* at 201 n.11. On remand, the district court revised its court-ordered reapportionment plan and did extend the time limits. *Beens v. Bidahl*, 349 F. Supp. 97, 99-100 (D. Minn. 1972).

obligations established therein. In addition, the special master is specifically authorized and empowered to employ an expert or experts versed in the subject area and such other expert and lay assistance as may be appropriate in the circumstances. Costs incurred shall be assessed againt the State of Ohio.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones/MC
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ John W. Peck
JOHN W. PECK
Senior U.S. Circuit Judge

Dowd, J. dissenting:

I find that the defendants have complied with the order of my colleagues published on January 31, 1992. The defendants were instructed to reconsider the 1991 apportionment plan and submit a revised plan unless the defendants were able to show a justification for the creation of additional majority-minority districts in the State of Ohio. In response the defendants filed an exhaustive set of fact findings [1] and engaged in a slight modification of the majority-minority districts.[2]

The basis for the creation of the majority-minority districts has been dismissed with the criticism that the justification is on a state-wide basis and does not include an analyis or justification on a district by district basis. I read the latest opinion of my colleagues to establish

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[1] On February 20, 1992 the defendants Voinovich, Taft and Aronoff filed findings and conclusions with respect to the creation of the majority-minority districts. The findings number 254 paragraphs and 106 pages and address such issues as History of Official Discrimination, Racial Bloc Voting, Racial Barriers to Effective Participation, Effects of Discrimination, Summary of Unemployment Rates by Race, Showing Disparate Unemployment Rates as to Blacks, Mean Household Income showing a great disparity between white and black households, an Analysis of Families Living Below Poverty Level, showing great disparity between white and black families, Education Findings, demonstrating that the percentage of blacks that have not completed high school and who have not completed one or more years of college are significantly higher than whites, findings that the value of housing between white families and black families are grossly disproportionate, the effects of overt or subtle racial appeals in the political process, the extent to which minorities had been elected to public office, and the lack of success of minorities in the election process in the major urban counties in Ohio other than Cuyahoga,

[2] After the majority of this Court remanded the 1991 Apportionment Plan to the Apportionment Board, downward adjustments as to black voters were made in six of the house districts represented by black incumbents with an increase in House District 38 represented by black incumbent Roberts.

the proposition that an apportionment body, be it a legislative body or, as in Ohio, a constitutionally created body, is not permitted to take into consideration the Voting Rights Act in the apportionment process unless the body, be it the legislature or the specifically designated body such as the governor, auditor of state, secretary of state and the two representatives from the General Assembly conduct a judicial like proceeding such as the case that gave rise to the *Armour decision*.[3] I again reject that proposition as unsound and not in keeping with precedent [4] or the legislative history of the Voting Rights Act.

Moreover, in this case, despite the sweeping language of the majority opinion, the recently filed fact findings of the defendants do address the creation on a specific basis the proposed majority-minority districts contained in the 1991 Apportionment Plan.

I commend my colleagues for the order to the extent it identifies for the citizens of Ohio the ramifications of its order today appointing a special master. As indicated, the May primary will not take place as scheduled unless a higher court should see fit to stay the majority's order. The General Assembly is now faced with the need to consider whether to move back the May primary until the designated date of June 2. However, the majority's opinion fails to address whether prospective candidates will be given an apportunity to file nominating petitions after the legislative boundaries are finally determined. Despite my commendation, I am apprehensive that the

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[3] 775 F. Supp. 1044 (N.D. Ohio 1991).

[4] *See Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). In *Garza*, the Court held that an apportionment Board has an obligation to reapportion when the districts do not meet the requirements based on the total population of the state divided by the number of districts designated in the state's constitution. A *failure* to reapportion, according to the Court, would be a violation of the Voting Rights Act.

work of the master and considerations of the challenges that are certain to flow from his recommendations place in jeopardy the revised date of June 2 for holding the primary for the General Assembly candidates.

I believe the order to the master also suffers from a lack of comprehensive instructions. The master is given no directions on the following issues.

1. What data base is the master to consider in responding to the reference? Is he to consider or ignore the extensive testimony received by the Apportionment Board as it conducted public hearings across the State of Ohio in 1991 before the 1991 apportionment plan was adopted? Is the master to ignore the Voting Rights Act in arriving at his recommendation? Is the master to conduct public hearings before making his recommendation?

2. The 1981 Apportionment Plan created four majority-Minority districts. The plan advanced in the 1991 Apportionment Plan as adopted calls for eight majority-minority districts. The plan advanced by the plaintiffs Quilter and Ferguson, also members of the Apportionment Board, proposed the creation of an additional two majority-minority districts. The rejection by the majority of this panel of the 1991 Apportionment Plan is anchored in the creation of the additional four districts without the requisite justification as deemed necessary by the majority. QUERY: Is the master free to recommend on this issue as to the number of majority-minority districts and, if so, based on what criteria? [5]

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[5] The Court notes that while the plaintiffs in this action criticized the defendants Voinovich, Taft and Aronoff, for creating eight majority-minority districts in compliance with the Voting Rights Act, the minority plan proposed by the Democrats contained two new majority-minority districts without even an attempt to make the fact findings the majority declares necessary to justify the creation of additional majority-minority districts.

3. How should the master consider and apply, if at all, the decision of the Ohio Supreme Court in its decision in the case of *Voinovich v. Ferguson* (1992) —— Ohio St. 3d —-? [6]

4. Should the master, as recommended by the defendants in its plan, create single county districts for the three counties of Fairfield, Wayne and Ashtabula, or disregard the discretionary decision of the defendants and adopt the view of the plaintiffs Ferguson and Quilter which declined to provide those three counties whole county district status? [7]

5. When is the master to report to this court? [8]

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[6] Justice Resnick of the Ohio Supreme Court authored a dissent in which she was critical of the 1991 Apportionment Plan as adopted by the three defendants Voinovich, Taft and Aronoff. The plaintiffs have seized upon the Resnick dissent and suggest that the 1991 Apportionment should be revisited in the context of the Resnick dissent. However, Justice Douglas' opinion is highly critical of the Resnick dissent and points out that the plaintiffs in this case, Ferguson and Quilter, declined to present the issues raised in the Resnick dissent. Consequently, significant issues of both collateral estoppel and abstention apply with respect to what consideration, if any, the Master is to give to the Ohio Supreme Court's decision in *Voinovich v. Ferguson.*

[7] See Article XI, § 10(B) which provides:

> Each county containing population between 90 and 95% of the ratio or between 105 and 110% of the ratio *may* be designated a representative district. (emphasis added)

[8] The plaintiffs filed in this case on March 10, 1992 a motion requesting this Court to order the Secretary of State to show cause why the Ohio Primary Election of May 5 should not be postponed pending the establishment of lawful legislative boundaries for the Ohio General Assembly. The Order of the Court approved by the majority of the panel inferentially addresses the motion by continuing the primary election for the Ohio General Assembly until June 2, 1992. As pointed out by the plaintiffs, Ohio Rev. Code § 3513.05(D), provides that *sixty* days before the primary date, the Secretary of State must "certify to each board [of elections] in the state the forms of the official ballots to be used at such primary

I have outlined some of the problems that the majority opinion creates to emphasize again the view that the responsible effort on the part of the defendants Voinovich, Taft and Aronoff to fairly reapportion the State of Ohio consistent with the provisions of the Ohio Constitution and the mandate of the Voting Rights Act does not warrant the majority's unprecedented judicial interference. Moreover, electoral chaos in Ohio for 1992 appears inevitable. I must respectfully dissent.

/s/ David D. Dowd, Jr.
DAVID . D. DOWD, JR.
U.S. District Judge

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election together with the names of the candidates to be printed thereon. . . ." (emphasis added).

The sixtieth day before June 2, 1992 is, by this Court's calculation, April 2, 1992. To meet that date and to allow time for candidates to file nominating petitions after the report of the Master is received and the Court hears objections thereto and enters a final order, it would appear that the Master's report should be filed with this Court by no later than March 16, 1992. Such a filing would give all interested parties seven days to file objections, i.e., by March 23, 1992 and then give this Court two days to respond by filing its final order on March 25, 1992. Under that scenario, prospective candidates would have until April 1, 1992 to file nominating petitions and the Secretary of State would have to respond under the provisions of O.R.C. 3513.05(D) by April 2, 1992.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

FINDINGS OF FACT SUPPLEMENTAL MEMORANDUM OF LAW, AND ORDER

[Filed Mar. 19, 1992]

Pursuant to Fed. R. Civ. P. 62(c), Defendants have moved this Court to stay its Order of March 10, 1992 pending appeal to the United States Supreme Court. The Defendants attached a Memorandum in Support, and the Plaintiffs, pursuant to this Court's direction, have submitted a Memorandum in Opposition to Defendants' Motion to Stay Pending Appeal.

In our Opinion and Order decided and filed January 31, 1992 ("Opinion"), we noted that "[t]he exigencies of the situation, which include satisfying deadlines, have required counsel for the parties to formulate and present

their positions with commendable speed, and have similarly imposed upon this panel a mandate to record the conclusions reached as rapidly as possible." Opinion at 17 n.2. Nonetheless, this Court is fully aware of its obligation to make more detailed findings of fact and conclusions of law. Accordingly, this opinion and order has a dual purpose: to respond to the motion for stay pending appeal and to more fully develop our legal conclusions and the factual support therefor.

I.

Defendants' motion to stay the Opinion and Order of the Court dated March 10, 1992 is based upon the same flawed legal premises previously rejected by this Court. In the context of the four-part test for stays pending review, Defendants argue, once again, that that they may undertake to "remedy" unproven Voting Rights Act violations on a wholesale, statewide basis without performing a legally adequate totality-of-circumstances analysis; that Ohio should be treated for Voting Rights Act purposes as if it were a § 5 state; that this Court's opinions are contrary to the Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as "every decision issued regarding the creation of majority-minority districts," Memorandum in Support at 5; and that, unless the Court stays the effect of its order enjoining Ohio's May 5, 1992 primary, political chaos will erupt throughout the state. Each of these arguments is without legal foundation or factual support.

II.

There are two principal authorities to which this Court has directed the parties' attention. These are the legislative history of the Voting Rights Act as set forth in the Senate Report on that Act and the *Gingles* decision of the Supreme Court. With respect to the authoritative nature of the Senate Report, the Supreme Court has stated, "[w]e are not persuaded that the legislative history of

amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill." *Gingles*, 478 U.S. at 43 n.7. Although *Gingles* cannot be automatically applied outside the context of multimember districting schemes, *see, e.g., Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991), *Gingles* remains the Supreme Court's landmark opinion explaining § 2 of the Voting Rights Act; it has been cited in the briefs of both sides herein as controlling authority with regard to racial bloc voting.

Both *Gingles* and the Senate Report state that violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action. In this regard, the Court in *Gingles* stated:

> Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

Gingles, 478 U.S. at 48 n.15.

The Senate Report is equally clear, particularly with respect to proof concerning racial bloc voting:

> The results test *makes no assumptions one way or the other* about the role of racial political considera-

> tions in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

S. Rep. No. 417, 97th Cong., 2d Sess. 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 212.

Defendants, as the majority of the Apportioning Board, have proclaimed their mission to be the remedying of purported previous Voting Rights Act violations. Nevertheless, the Board would exempt itself from the necessity of proving Voting Rights Act violations by conducting the "searching practical evaluation of past and present reality," *Armour*, 775 F. Supp. at 1049 (quotation taken from Senate Report at 30), required by the Senate Report and by *Gingles*. By exempting itself from the necessity of proof, the Board can thus ignore three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such candidates have been elected over a sustained period of time. Moreover, by exempting itself from the necessity of proof, the Board may, in the name of "remedy," pack black voters in urban areas and fragment them in suburban areas, politically segregating them and diluting their vote.

If the Board were correct in its premise that there is no legal requirement of proof before a "remedy" is applied, then in the hands of the Board, the voting Rights Act itself becomes a "device" to dilute the voting strength of the protected minority. All "devices," including sophisticated devices, were outlawed by Section 2 of the Act. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (noting that Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination").

Defendants, as well as the dissent from our January 31, 1992 Opinion and Order, distort this aspect of the

Court's opinion. They imply that this Court had held that an apportioning board must engage in a totality-of-circumstances analysis prior to any racially conscious redistricting. They similarly imply that this Court held that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation, unless it first analyzes the totality of the circumstances. Neither of these contentions is true.

This Court was not faced with mere race-conscious redistricting that sought to avoid the division of contiguous, cohesive concentrations of minorities. This Court was also not faced with a plan that simply created a substantial number of majority-minority districts without explanation. Finally, this Court was not faced with a state subject to § 5 of the Voting Rights Act, in which case the historical violation of minority rights has been conclusively established. Rather, this Court addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based on Ohio policy and law; rather, it contended that such a per se rule is mandated by federal law.

In this context, the dissent criticized our Opinion for focusing on the process of redistricting rather than its effects.[1] It is the process, however, that violates the text of the Voting Rights Act: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988). Although "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment," the Supreme Court has upheld the creation of majority-minority districts only in the context

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[1] Focusing on the process, however, is entirely appropriate, because like the *Jeffers* court, *see infra* part III, we mandate no particular result.

of § 5 of the Act: "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to assure that its reapportionment plan complies with § 5." *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 161 (1977). The implication is clear: the creation of majority-minority districts wherever possible is a remedy, not a right.

Nonetheless, this Court took a broad view of the Act. If officials of the state of Ohio seriously wish to concede that they have, in the past, intentionally and purposefully discriminated against minorities statewide, and that theirs is a state with a legacy of legally significant racial bloc voting, then this Court would be required to conclude that Congress had erred in excluding Ohio from the list of states subject to the Voting Rights Act. As discussed *infra* part III, this was essentially the approach of the court in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). If difficulty in electing candidates of choice and racial bloc voting are not proven, however, then the key elements upon which a "remedy" must be premised are missing. As the record demonstrates, legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice in *any* district other than the two districts (51 and 52) addressed by the court in *Armour*. There is simply no proof to support a finding of the inability of black voters either to elect candidates of their choice or to affect the election of candidates of their choice in given legislative districts.

Indeed, the issue here is not whether the Board should be permitted to redress proven wrongs, but instead, whether the Board should be permitted to destroy what is right in Ohio—that is, coalitional voting. As is shown by evidence introduced by both parties, the white crossover vote for black legislative candidates was very sub-

stantial, usually more than 50%.[2] Such voting is not legally significant racial bloc voting;[3] rather, it is coalitional voting, and this coalition of black and white voters is the target of the Board's plan. The Voting Rights Act

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[2] Instead of the racial bloc voting that the Defendants' contend has characterized House legislative races in which minorities were candidates, Dr. Henderson performed a bivariate analysis for the election years 1990, 1986, and 1984, showing that there was highly coalitional voting in each of those elections.

Minority Rep.	White Crossover Vote (%)
T. James	63.71
C. Prentiss	51.65
V. Whalen	67.55
W. Mallory	50.66
H. Rankin	50.93
R. Miller	44.50
O. Beatty	50.25
R. McLin	35.44
T. Roberts	45.98
V. Sykes	48.76
C. Jones	44.46

Dr. King, the Defendants' expert, criticized Dr. Henderson's analysis, and used a different approach, but nevertheless, Dr. King concluded that, on average in statewide races, 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates and, thereby, confirmed Dr. Henderson's conclusions. Apportionment Board Hearing, February 11, 1992, at 48-49.

[3] Dr. King, however, like Mr. Tilling, chooses to ignore the *Gingles* qualifier "legally significant" and opines that there is polarized voting wherever blacks and whites differ in the amounts of their vote. Even so, King does not challenge Henderson's results. Dr. King's regression analysis reflects the average proportion of whites voting for black incumbents in the years 1980-1990 as follows: 1984—56.7%; 1986—60.2%; 1988—67.8%; and 1990—61.5%. Oddly, Dr. King finds racial bloc voting by subtracting the percent of white voters voting for black candidates from the percent of black voters for black candidates. Testimony of King, Feb. 18 Hearing at 48-49. Under this analysis, the only situation where racial bloc voting would not exist would be where black voters support black candidates in smaller numbers than white voters. *Id.*

was not designed to serve the purposes of preventing coalitional black and white voting.

While the Board argues that it should be found exempt from the necessity of a "totalities" analysis, its fallback position is that it has satisfied that analysis. It points to the "new" evidence that it has submitted. This new evidence, however, fails to connect the socioeconomic statistics presented to any proven inability of black voters either to elect or affect the election of candidates of their choice. Even in the unfortunate circumstances where blacks continue to suffer the social and economic effects of past discrimination, it must still be proven that there is a substantial inability to elect candidates in the areas at issue. *See Gingles*, 478 U.S. at 48 n.15. No such proof was even proffered by the Board.

III.

In its January 31, 1992 Order and Opinion, this Court stated, "[t]he language of § 2 of the Voting Rights Act contains no requirement for majority-minority districts," Opinion at 8, recognizing that, "where the creation of majority-minority districts wastes minority votes by packing and dilutes minority influence by fragmenting, the result is an 'abridgement of the right . . . to vote on account of race or color' which *violates* the Voting Rights Act," *id.* at 8-9 (emphasis added).

The Defendants originally relied on *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) to support their per se approach.[4] Consequently, this Court reviewed *Gingles* and found "nothing in *Gingles* which establishes a *per se* requirement for the creation of majority-minority dis-

[4] On a number of occasions, Mr. James Tilling, allegedly speaking as the Board's agent, referred to *Armour*, *Gingles*, and the 1982 amendment to the Voting Rights Act to erroneously justify his belief that the Board Majority had a legal obligaiton to create majority-minority districts wherever possible.

tricts." Opinion at 10. This Court also reviewed *Armour* and concluded that "*Armour* does not stand for the proposition that persons responsible for apportionment should create majority-minority districts wherever possible." *Id.* at 11. Without distinguishing our reading of *Gingles* or *Armour*, the Board cites four cases that allegedly "require a state to affirmatively address the dilution of majority voting strength in the apportionment process whenever the opportunity to do so exists." Memorandum in Support at 5-6. These cases are: *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); and *Jeffers v. Clinton*, 730 F. *Supp.* 196 (E.D. Ark. 1989), *aff'd* mem., 111 S. Ct. 662 (1991). *United Jewish Organizations* and *Beer* are § 5 cases. *Garza* is a case in which there had been repeated intentional violations of the Fourteenth and Fifteenth Amendments. *Jeffers* is a case in which the court found a violation of § 2 of the Act and instituted creation of majority-minority districts as a *remedy*.

Ohio is not now, and has never been, subject to the preclearance requirements of § 5 of the Voting Rights Act. The Voting Rights Act was passed in 1965 because "[t]raditionally, black Americans were denied the franchise throughout the South." Senate Report, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 182. The Act operates on two levels: first, § 5 of the Act requires "covered jurisdictions" to preclear any changes in voting or election laws, and second, § 2 of the Act prohibits discriminatory practices nationwide. *Id.* at 5-6, *reprinted in* 1982 U.S.C.C.A.N. at 182-83. The § 5 "covered jurisdictions" were established in 1965, and the preclearance requirements were extended in 1969, 1970, and 1975, because Congress made "a careful review of the contemporaneous record of ongoing voting rights discrimination" in areas affected. *Id.* at 8-9, *reprinted in* 1982 U.S.C.C.A.N. at 185-86.

There is a profound and distinct difference between § 5 and § 2 of the Voting Rights Act. In § 5 localities, the inability of minorities to participate equally in electoral processes has already been proven by the legislative findings of Congress. Racial bloc voting and the inability to elect or affect the election of candidates of choices were proven; these were but two of the myriad of the proven elements that deprived blacks of their electoral franchise in these covered jurisdictions. Hence, these facts did not have to be proven under a totalities test in a § 5 area; they could properly be assumed. The "results" test of § 2, however, made no such assumptions. The Senate Report explains the necessity of examining local circumstances carefully and avoiding mechanistic rules:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

Id. at 31, *reprinted in* 1982 U.S.C.A.N. at 208.

States which are subject to § 5 of the Voting Rights Act must submit proposed apportionment plans for approval to the Attorney General or a three-judge court. 42 U.S.C. § 1973c. With respect to states subject to § 5, there has been a prior determination that the discriminatory voting practices of that state have been so substantial that future redistricting plans are automatically suspect and remains so until the Attorney General or a court approves the particular plan in question:

> It is evident that the Act's prohibition against instituting new voting procedures without the approval

> of the Attorney General or the three-judge District Court *is not dependent upon proving past unconstitutional apportionments* and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court.

Carey, 430 U.S. at 157 (emphasis added).

Those drafting an apportionment plan for a state subject to § 5 must operate upon the assumption that racially discriminatory practices or procedures with respect to voting rights exist or existed and, consequently, must draft the plan accordingly. Thus, it is proper, and in some instances required, that a § 5 state draw majority-minority districts without first determining whether a "searching practical evaluation of the past and present reality" supports such creation. In fact, the Supreme Court, in the context of § 5, stated: . .

> *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." This *test* was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented.

Id. at 159 (quoting *Beer v. United States*, 425 U.S. at 141) (emphasis added) (citations omitted). Although Defendants quote this language, they take it out of context by failing to note that the Court was specifically addressing § 5. The "test" referred to by the Court was the test articulated in *Beer*, where the Court was ad-

dressing a § 5 state's submission of its proposed plan for councilmanic districts for approval. "In *Beer v. United States*, 425 U.S. 130 (1976), the Court considered the question of what criteria a legislative reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the 'effect' of denying or abridging the right to vote on account of race." *Carey*, 430 U.S. at 159.

Garza, although it is not a § 5 case, has all of the earmarks of a § 5 case. There, the trial court found, and the court of appeals confirmed, that intentional discrimination had been practiced for decades against the Hispanic minority. *Garza*, 918 F.2d at 771. The Court found that, since at least 1959 and continuing in 1965, 1971, and 1981, Hispanic voters had been deliberately fragmented to dilute the effect of their vote on future elections, and that despite this evidence, the apportioning body had refused to draw the necessary majority-Hispanic district. *Id.* at 766-769. The court then accepted a plan that drew the required district.

In *Garza*, not only was the totalities test satisfied, but the even stricter test of *City of Mobile v. Bolden*, 446 U.S. 55 (1980)—intentional discrimination—had also been met. *See Garza*, 918 F.2d at 771. Accordingly, *Garza* does not stand for the proposition that a Board must draw majority-minority districts wherever possible, in the absence of conclusive proof of a Voting Rights Act violation. Rather, *Garza* indicates that such a district will be drawn by the court only where there is proof of intentional discrimination extending over many years.

In *Jeffers*, the court addressed a § 2 voting rights challenge. Nonetheless, even when promulgating its *remedy* for a *proven violation*, the court expressly disclaimed a contention that it was mandating the creation of any particular number of majority-minority districts:

> *We are not holding that the law requires the creation of any particular number of majority-black districts.*

> We know, and have found in this opinion, how many such districts can be created, and we also know that their lines can be drawn as to make them reasonably compact and contiguous. There is, therefore, a sort of presumption that any plan adopted should contain that number of majority black districts. There may be practical problems which we cannot foresee, though, and we are not foreclosing our duty to consider them after both sides submit their plans.

Jeffers, 730 F.Supp. at 217 (emphasis added). The *Jeffers* court not only expressly disclaimed the contention that it was requiring the creation of majority-black districts, it in fact found that the creation of majority-black districts was the only way to overcome the invidious racial discrimination existing in Arkansas' political and electoral processes. Indeed, it was the high degree of racial bloc voting present in Arkansas, outside Pulaski County, that caused the court to endorse the maximization of majority-minority districts:

> it is true here. . . . that there is racially polarized voting in races for the Arkansas State Legislature, that black voters usually vote cohesively, as a unit, and that white voters have the strength under the present plan of apportionment (except in majority-black districts) to enable them to frustrate the choices made by black voters.

Id. at 209 (citation omitted). Such racial bloc voting, warranting the per se creation of majority-minority districts, is not present in Ohio. Indeed, substantial coalition voting between the races exists in Ohio, where white crossover voting contributes to the election or reelection of all eleven of the black Ohio state legislators.

Contrary to this Court's recognition of the vital importance of following the proper process and avoiding the pitfalls of a per se application of majority-minority districting, the Board would arrogate to itself the unreview-

able discretion to determine where and to what extent there existed dilution of minority voting strength. With such unchecked power to determine dilution, an apportioning body, acting cynically, would be able to pack and fragment black voters at its political whim. Given the total absence of proof of legally significant racial bloc voting, the issue presented by the Board's argument is quite simple: whether an apportioning board should have unlimited discretion to apply the Voting Rights Act without a totalities analysis.

Gingles held that a trial court, in determining "whether the political process is equally open to minority voters," must (1) consider the "totality of the circumstances" and (2) conduct " 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621 (1982)). If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," *id.*, it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. Whether such a Board is competent in the first instance to make the necessary totalities evaluation required by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.

Defendants have not and cannot cite to a single case, involving violations of § 2 of the Voting Rights Act, that stands for, or even lends support to, its proposition that federal law, in the absence of a proven § 2 violation, requires per se creation of majority-minority districts wherever possible. Furthermore, both of the § 5 cases cited by Defendants to support their per se approach were decided prior to the 1982 amendment to the Voting Rights Act, which together with its legislative history,

unambiguously sets forth the requirements for establishing a violation of § 2 of the Voting Rights Act.

The Defendants argue that this Court, itself, did not conduct a totalities evaluation to justify its finding that the Board violated the Voting Rights Act. This argument is rather clever sophistry. Having implemented the Voting Rights Act remedy in the absence of a violation, Defendants suggest that we are now required to establish a violation as a prerequisite to removing the remedy. Actually, however, this task is not as difficult as it seems. The totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population.[5] Against this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes[6]—exactly

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[5] There is only one district in the last twenty years that had more than thirty-five percent African-American population but did not elect an African-American. The exception was Senate District 25 in Cleveland, which elected Lee Fisher, subsequently and presently the elected Attorney General of Ohio. Thirty-five percent is considered adequate to elect a black person in Ohio because Ohio does not have the history of racial polarization in voting. Deposition of Horn at 98-99.

[6] Henderson states that the significance of the size of the white crossover vote in the 11 minority districts is important because it is clear evidence of coalitional voting, by which he means that a significant portion of white voters are willing to vote for the candidate of choice of black voters. Henderson states that the existence of substantial white crossover voting means that the plan drawer must take particular care to avoid packing of minority voting strength. Deposition of Henderson at 23. He also states that the size of the white crossover vote provides one measure or criterion by which you may assess what the dividing line is between packing and not packing minority voting strength. *Id.*

On this point, the dissent notes that "[b]y way of summary, the 1991 Apportionment Plan creates four (4) majority-minority districts in Cuyahoga County with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with a black population

what the Defendants intended. It is no defense to say that the concentration and dispersal of black voters is being done on a benevolent basis to guarantee the election of black candidates, as the Board would argue. The Board's argument is nothing less than an argument for proportional representation. Section 2 of the Voting Rights Act makes it clear that, the totality of the circumstances aside, nothing in that section "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[7] 42 U.S.C. 1973(b).

Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally[8] and for po-

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of 74.80%, 90.05%, and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%." Dissent at 10.

First, both parties seem to agree with the changes Cuyahoga County. Second, the Defendants and the dissent constantly rely on these types of comparisons, yet they are not legally relevant. The 1981 apportionment of Cuyahoga County was never found to violate the Voting Rights Act. Similarly, the Democrats' proposed plan is irrelevant in this context for the simple reason that it is not, nor has it ever been, the apportionment plan of Ohio.

[7] Interestingly, Ohio is apparently unique in that proportional representation would be a step backward for African-Americans in Ohio, at least as far as the House is concerned. The black minority population in Ohio is predominantly located in its six major urban counties of Cuyahoga (24.9%), Franklin (15.9%), Hamilton (10.9%), Montgomery (17.7%), Summit (11.9%), and Lucas (14.8%). Those six counties account for approximately forty-four of the ninety-nine house districts and are presently represented by 11 minority representatives even though the total black population of the six counties (according to 1990 census figures) is only 19.1% of the total population of the six counties.

[8] Tilling states that, in the most populous counties, he drew boundaries in accordance with his understanding of the requirements of the Voting Rights Act first. Deposition of Tilling, 11/22/91, at 49. There were times when he would cross Ohio political boundaries in order to comply with his understanding of the

litical advantage[2] in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. *See Garza*, 918 F.2d at 771. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim. *See Armour*, 775 F. Supp. at 1060-61.

IV.

The Defendants, despite having had two opportunities to draw a lawful apportionment plan over a period of many months, have now asked the Court to stay its March 10, 1992 Order because they have not had a reasonable opportunity to adopt a substitute plan. Defendants tell only half the story by stating that this Court's order only gave them the opportunity to reconsider the plan to show justification for the creation of majority-minority districts. This Court ordered the Board to re-

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Voting Rights Act. *Id.* at 51-52. If there had been no Voting Rights Act requirement to create majority-minority districts, he understood that he would not have had to cross Ohio political boundaries. *Id.* at 52. He followed his understanding of the concept of federal supremacy and drew the lines as he perceived the Voting Rights Act required. *Id.*

[2] We offer the following as examples. Tilling had the "Republican Opportunities" document prior to his submission of the plan and while he was drawing the plan. Deposition of Tilling, 11/22/91 at 17-19. Henderson states that he considers Exhibit 11 to be a roadmap detailing how you create a racial gerrymander. Deposition of Henderson at 57. Robert Bennett, Chairman of the Ohio Republican Party, understood that creation of majority-minority districts would benefit Republicans. Deposition of Bennett, *passim*. On the "Let's Pretend" documents referring to Hamilton County, it states: "In this 'Republican' county the strategy is to 'pack' as much of the Democrat minority as possible into two heavily Democratic districts with black majorities." Deposition of Lawrence at 75-76. Mr. Horn's whole objective was to create what he was calling a Republican gerrymander. *Id.*

For incorporation of all these concepts, see generally Deposition of Horn, *passim*.

consider its plan, stating "[u]nless it can show justification under the totality of circumstances test for the present configuration, the Board must submit a revised plan to this court within 20 days of the date of this order." Opinion at 16. Thus, the Board had two options: (1) properly evaluate the totality of circumstances and, if the outcome justifies the plan's creation of majority-minority districts, submit that evidence to the Court or (2) submit a revised plan. The Board clearly chose option 1.

The Defendants' arguments for a stay, based on the assertions that the Court has misread, misapplied, and otherwise misinterpreted the basic law applicable to voting rights, do not support an optimistic view that the Defendants are now prepared to follow the Court's orders. Accordingly, the appointment of the Special Master was essential.[10]

Specifically addressing the criteria for a stay pending appeal, the only irreparable harm that the Defendants suggest would occur to them is that their plan may become moot because a lawful plan may be adopted consistent with the Court's order. This is not the sort of irreparable harm recognized in law. A party is not irreparably harmed if its unlawful plan is not implemented.

The Defendants also argue that the class of black voters who were both packed and fragmented by the Board's plan will not be injured, because they will in no way be prohibited from "effectively participating." Memorandum in Support at 18. If this means that black voters, like all other voters, will be entitled to vote, the argument begs the question. The right to vote encompasses the right not to have one's vote unlawfully diluted. The fol-

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[10] In response to the dissent, we note only that we know of no authority that requires this Court to delineate all of its instructions in the order appointing the Master, which history indicates is often self-defeating.

lowing excerpt from the Senate Report puts this right in the proper perspective:

> The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds* v. *Sims*. The Supreme Court based its ruling on the fundamental view that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."
>
> In defining the basic dilution principle, the Supreme Court observed:
>
> > "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

Senate Report at 19, *reprinted in* 1982 U.S.C.C.A.N. at 196 (footnote omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 n.29, 562 (1964)).

The Defendants contend that the most significant harm occasioned by not granting a stay will be public uncertainty. Contrary to this suggestion, the confusion resulting from granting a stay would be far greater than the alternative of the orderly process put in place by this Court. This Court takes notice that, for reasons unrelated to this litigation, the congressional redistricting of the state of Ohio has not been concluded as of the time of this filing. Accordingly, the timetable established by the

Ohio statutes and required to be followed by the Secretary of State, Mr. Taft, a defendant herein, cannot be observed, and the May 5, 1992 primary election must be postponed, in any event, to a later date. Staying the Court's Order would not resolve the time pressures caused by this delay.

Moreover, the granting of a stay would arguably put the 1991 plan back into effect, since the 1992 plan is simply a "remedy" that was submitted to the Court and which has been rejected. If the proposed 1991 plan is put into effect, even greater confusion will follow. Setting aside the Court's order would expose the candidates and the public to the possibility that primary elections might be held in districts different from the general election. The unlawful nature of the 1991 legislative boundaries that were drawn on the basis of race is clear. The necessity of conducting elections within boundaries that are lawful can be achieved by following the process that the Court has in place. To abandon that process would require a determination that African-Americans must be concentrated in majority-minority districts wherever possible, a political theory finding support in neither the Voting Rights Act nor in decisions interpreting that Act. For the foregoing reasons, Defendants' Motion to Stay Pending Appeal is DENIED.

V.

As of the date of this opinion, a special master is in the process of drawing a constitutional plan for the State of Ohio. In this regard, the majority of this Court has issued a series of specific instructions, one of which involves the Fourteenth Amendment. In its present posture, this issue is moot, because Special Master Kane will comply with the Fourteenth Amendment. For purposes of completeness, however, we note that both the 1991 and 1992 plans violated the Fourteenth Amendment.

"The Equal Protection Clause requires that legislative districts be of nearly equal population, so that each per-

son's vote may be given equal weight in the election of representatives." *Connor v. Finch*, 431 U.S. 407, 416 (1977). The Supreme Court applies a 10% total deviation[11] rule; deviations in excess of that amount require justification by compelling, legitimate state interests. *See White v. Regester*, 412 U.S. 755, 776-77 (1973) (Brennan, J., dissenting) (stating the general rule that emerges from the majority's holding). Ordinarily, Ohio's provision of a plus or minus 5% *deviation* matches the requirement of a 10% *total deviation*.

The Apportioning Board, however, twice set aside the 5% standard. As the dissent notes in its findings regarding the apportionment process:

> single member county districts are mandated in the event the county's total population is with 5% of the ideal number. Four Ohio counties, Warren, Wood, Allen and Columbiana, fell within that computation for 1991. *The apportionment board may also create single member districts for counties with a total population that is within 10% of the ideal number.* The 1991 plan includes in that latter category an additional three counties, Fairfield, Wayne and Ashtabula.

Dissent at 7 (emphasis added).[12] The second violation occurred in Senate District 32, which has only 94.6% of the ideal district ratio.

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[11] Total deviation is arrived at by adding the percentage above the ideal district population of the most overpopulated district to the percentage below the ideal district population of the most underpopulated district. Thus, a districting criterion that allows a *deviation* of plus or minus 5% would, generally speaking, yield a *total deviation* of 10%. *See, e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977) (finding that 8.2% above the norm and 8.3% below the norm yield a total deviation, or "maximum deviation from population equality," of 16.5%).

[12] Note, however, that the dissent misconstrues what the Supreme Court means by deviation. *See* Dissent at 18. A 10% deviation, of course, has the potential to yield a 20% total deviation.

Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized that, under the Fourteenth Amendment, standard districting criteria, such as respect for city or county boundaries, must give way to the equal population standard if there is an unavoidable conflict. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989) ("The one-person, one-vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political and geographic units be split in others."), *aff'd mem.*, 111 S. Ct. 662 (1991). Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
Circuit Judge

/s/ John W. Peck
JOHN W. PECK
Senior Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

NOTICE OF APPEAL

[Filed Mar. 11, 1992]

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Opinion and Order of January 31, 1992, and the Order of March 10, 1992. This appeal is taken pursuant to 28 U.S.C., § 1253.

Respectfully submitted,

/s/ N. Victor Goodman
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Appeal in this case has been served by first-class United States mail service, postage prepaid, this 11th day of March 1992, upon the following Counsel of Record in this case.

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/s/ Maynard A. Buck
MAYNARD A. BUCK

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

STIPULATION

Pursuant to Supreme Court Rule 18.5, Plaintiffs and Defendants hereby stipulate that the portion of the appeal to the United States Supreme Court from the January 31, 1992 Order of the District Court shall be dismissed. The stipulation does not affect the appeal from March 10, 1992 Order.

So Stipulated:

/s/ Armistead W. Gilliam, Jr.
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(By Orla E. Collier per
telephone authority from
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following by telecopy and by Federal Express, this 19th day of March, 1992:

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/s/ N. Victor Goodman
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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

NOTICE OF APPEAL

[Filed Mar. 25, 1992]

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Findings of Fact, Supplemental Memorandum of Law, and Order of March 19, 1992. This appeal is taken pursuant to 28 U.S.C. § 1253, and is in addition to the previous Notice of Appeal filed March 11, 1992 to the three-judge district court's Order of March 10, 1992.

Respectfully submitted,

/s/ N. Victor Goodman
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Appeal in this case has been served by first-class United States mail service, postage prepaid, this 25th day of March, 1992, upon the following Counsel of Record in this case.

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APPENDIX H

STATE OF OHIO

BEFORE THE PERSONS RESPONSIBLE	)
FOR APPORTIONMENT PURSUANT TO	)
ARTICLE XI. SECTION 1 OF THE	)
OHIO CONSTITUTION	)

FINDINGS AND CONCLUSIONS

In accordance with the order of remand of the Federal District Court, Northern District of Ohio, Eastern Division dated January 31, 1992, in *Quilter et al v. Voinovich, et al.*, Case No. 5:91CV-2219, the persons responsible for apportionment pursuant to Article XI, Section 1 of the Ohio Constitution hereby issue their Findings and Conclusions as follows:

FINDINGS

I. VOTING RIGHTS ACT/FIFTEENTH AMENDMENT

A. Adoption of the 1991 Apportionment Plan—Endorsement by Minority Groups

1. Pursuant to Article XI, Section 1 of the Ohio Constitution, the persons responsible for apportionment in 1991 are Governor George Voinovich, Secretary of State Robert Taft, II, Auditor Thomas Ferguson, Stanley J. Aronoff, President of the Ohio Senate, and Representative Barney Quilter. (Deposition of James R. Tilling, December 14, 1991, Defendants' Exhibit 96, TR. 8).[1]

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[1] All references to exhibits are references to the exhibits submitted in the record in *Quilter v. Voinovich et al.*, Case No. 5:91CV-2219 unless otherwise noted. These exhibits, together with additional exhibits concerning the "totality of circumstances test", were also admitted at the public hearing before the Board on February 11, 1992. The deposition of James R. Tilling taken on December 14, 1991 is submitted as Defendants' Exhibit 96. The deposition will, hereinafter, be referred to as "Defendants' Ex. 96".

2. On August 22, 1991, Mr. Tilling was designated Secretary to the persons responsible for apportionment. Mr. Tilling was directed by Governor Voinovich, Secretary Taft, and President Aronoff to draft the 1991 Apportionment Plan which was adopted by the persons responsible for apportionment. (Defendants' Ex. 96, TR. 7).

3. In drafting the 1991 Apportionment Plan, Mr. Tilling was instructed by Governor Voinovich, Secretary Taft, and President Aronoff to: (1) comply with the Ohio Constitution; (2) comply with the United States Constitution; and (3) comply with the Voting Rights Act. (Defendants' Ex. 96, TR. 23).

4. Mr. Tilling is Chief Executive Officer of the Ohio Senate and has been so employed since January, 1985. (Defendants' Ex. 96, TR. 4). Mr. Tilling has a B.S. degree in Social Sciences from Clarkson University, a Masters degree in political science from the University of Illinois, with a major in urban and metropolitan politics, and has completed course work toward a PhD. (Defendants' Ex. 96, TR. 5). Mr. Tilling is a former professor of political science at Ohio University where he taught from 1969 to 1976. (Defendants' Exhibit 96, TR. 6).

5. In 1981, Mr. Tilling led a bipartisan effort to prepare the 1981 Congressional redistricting plan. (Defendants' Ex. 96, TR. 10). Mr. Tilling's testimony concerning the 1981 Congressional plan was accepted by the Federal District Court in *Flanagan v. Gil[illegible]or*, 561 F.Supp. 36 (S.D. Ohio, 1982), where a three judge court upheld the 1981 Congressional plan against claims of racial discrimination.

6. In 1981, Mr. Tilling was actively involved in a proposed Ohio Constitutional amendment to provide for fair and impartial state apportionment. The proposed amendment, the "FAIR" proposal (Fair and Impartial Redistricting), was supported by the ACLU and the Council of Churches but was defeated at the polls. (Defendants' Ex. 96, TR. 11).

7. Mr. Tilling has served the last four years on the National Conference of State Legislators Task Force ("NCSL Task Force"), a bipartisan task force composed of representatives of all fifty states and designed to deal with apportionment issues. Mr. Tilling is currently Vice-Chair of that national task force. (Defendants' Ex. 96, TR. 9, 12).

8. In his involvement with the NCSL Task Force, Mr. Tilling has chaired panels on minority voting issues under the Voting Rights Act. Mr. Tilling has worked closely with Clifford Collins, Director of Voter Education of the NAACP, with James Daniels, State Chairman of the Ohio Conference of Branches of the NAACP, Frank Allison, President of the Cincinnati Branch of the NAACP, Fred Parker, President of the Columbus Branch of the NAACP, Floyd Johnson, State Coordinator for Ohio Apportionment, and other minority representatives. (Defendants' Ex. 96, TR. 14, 15 and 19). Mr. Tilling has also participated in regional conferences, sponsored by the NAACP, regarding minority voting issues. (Defendants' Ex. 96, Tr. 19). Mr. Tilling has also participated in panels, co-hosted by the United States Bureau of the Census, dealing with apportionment issues. (Defendants' Ex. 96, TR. 14.)

9. Mr. Tilling is Co-Chairman of the Ohio Legislative Task Force on Reapportionment, Redistricting and Demographic Research, a bipartisan effort to deal with technical issues in the 1991 apportionment, including collection and computerization of census data. (Defendants' Ex. 96, TR. 25).

10. The Ohio Legislative Task Force engaged Cleveland State University to prepare a "unified data base" for use by interested groups and the general public in the 1991 apportionment process. The unified data base included PL-94171 population counts, racial demographic data and election results for all 1990 statewide races and 1990 Ohio House and Senate races. Population data was

prepared by census tracts and ultimately converted to population data by wards and precincts. (Defendants' Ex. 96, TR. 24, 25 and 27).

11. All data created by Cleveland State University in the unified data base has been stipulated in this proceeding. (See Joint Stipulation).

12. The persons responsible for the 1991 apportionment first met on August 22, 1991. Thereafter, public hearings were held at fifteen sites throughout the State of Ohio over the ensuing two and one half weeks. The purpose of the public hearings was to obtain public comment, and particularly minority input, concerning the 1991 apportionment. Transcripts of the public hearings have been submitted as Joint Exhibits. (Defendants' Ex. 96, TR. 32, 33). This was the first time in Ohio history that such public apportionment hearings were held and that the public was given access to a data base and computer terminal.

13. On September 26, 1991, proposed apportionment plans were submitted by: (1) the majority of persons responsible for apportionment (Governor Voinovich, Senator Aronoff and Secretary of State Taft); (2) the minority of the persons responsible for apportionment (Auditor Ferguson and Representative Quilter); (3) the Ohio Conference of Branches of the NAACP; (4) the Black Elected Democrats of Ohio (BEDO); and (5) the Ohio Republican Party.

14. Defendants' Exhibit 1 (the "1991 Majority Plan") is the apportionment plan submitted by the majority of persons responsible for apportionment and adopted on October 1, 1991, amended on October 3, 1991 and published by the Governor on October 5, 1991. Defendants' Exhibit 76 is the apportionment plan submitted by the Ohio Conference of Branches of the NAACP. Defendants' Exhibit 77 is the plan submitted by BEDO. Defendants' Exhibit 78 (the "1991 Minority Plan") is the plan sub-

mitted by Messrs. Ferguson and Quilter on behalf of the Democrats. Defendants' Exhibit 79 is the plan submitted by the Ohio Republican Party. (Defendants' Ex. 96, TR. 34, 35).

15. The plan submitted by BEDO (Defendants' Ex. 77) and the plan submitted by Messrs. Ferguson and Quilter (Defendants' Ex. 78) are precisely the same plan. (Defendants' Ex. 96, TR. 36).

16. On September 30, 1991, the persons responsible for apportionment met to hear testimony from the various proponents of the plans. A transcript of the proceedings is submitted as a Joint Exhibit. (Defendants' Ex. 76, TR. 37).

17. On October 1, 1991, the persons responsible for apportionment met again to consider adoption of a final plan of apportionment. The meeting was recessed from time to time to permit discussions among representatives of BEDO and the NAACP and Mr. Tilling to attempt to reach a consensus concerning minority districts (Defendants' Ex. 96. TR. 39). A transcript of these proceedings is also submitted as a Joint Exhibit.

18. The above-referred discussions were initiated by Mr. Tilling after representatives of BEDO and the NAACP failed to reach a consensus regarding minority districts. Mr. Tilling contacted Congressman Stokes to attempt to bring the minority groups together. Tilling initiated these discussions since he knew that minority voting issues would be the focal point of the apportionment process. (Defendants' Ex. 96, TR. 39, 42).

19. Floyd Johnson represented the NAACP in these discussion. Mr. Johnson has worked for the NAACP for the last twenty-five (25) years. Mr. Johnson is Chairman of the Dayton Political Action Committee of the NAACP and is State Coordinator For Reapportionment and Redistricting for the Ohio Conference of Branches of

the NAACP. Mr. Johnson was appointed to the latter position by James Daniels, President of the Ohio Conference of Branches of the NAACP. (Deposition of Floyd Johnson, December 10, 1991, Defendants' Exhibit 97, TR. 6, 7).[2]

20. Floyd Johnson is a long-standing civil rights activist. Mr. Johnson began registering minority voters in 1963, when he registered his father to vote. Mr. Johnson also assisted the late Representative C.J. McLin in every voter registration drive he conducted. (Defendants' Ex. 97, TR. 6). Mr. Johnson has been involved with the Congress of Racial Equality, the Non-Violent Coordinating Committee, the Dayton Alliance For Racial Equality and the Democratic Voters League. (Defendants' Ex. 97, TR. 11-12). Mr. Johnson has been actively involved in minority voting issues since the passage of the Voting Rights Act of 1965. He has attended workshops and conventions sponsored by the NAACP, regarding minority voting issues. (Defendants' Ex. 97, TR. 13). Mr. Johnson has been an active Democrat since 1960 and has run for a house seat in Montgomery County on two occasions. (Defendants' Ex. 97, TR. 12, 14, 15).

21. Mr. Johnson prepared the proposed apportionment plan submitted by the Ohio Conference of Branches of the NAACP. As stated, Mr. Johnson was the State Coordinator For Real Reapportionment and Redistricting for the Ohio Conference of Branches. Mr. Johnson reported to the State Committee, composed of all presidents of the local branches of the NAACP. The most active members were Frank Allison of the Cincinnati branch,

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[2] The deposition of Floyd Johnson taken on December 10, 1991 is submitted as Defendants' Exhibit 97. The deposition will be hereinafter referred to as Defendants' Ex. 97. Mr. Johnson testified at the February 11, 1992 Apportionment Board hearing, where he reaffirmed his deposition testimony and offered further supporting testimony on the "totality of circumstances test." (Transcript of Board Hearing, February 11, 1992, TR 61-76).

Fred Parker of the Columbus branch, Jesse Gooding of the Dayton branch and James Daniels, President of the Ohio Conference of Branches of the NAACP. (Defendants' Ex. 97, TR. 15).

22. BEDO was represented in the discussions of October 1, 1991 by Dana Mattison, its Executive Director. (Deposition of Dana Mattison, November 26, 1991, defendants' Exhibit 82, TR. 1).[3]

23. During the evening of October 1, 1991, BEDO, the Black Elected Democrats of Cleveland, Ohio ("BEDCO") and the NAACP reached a consensus regarding the establishment of minority districts in Cuyahoga County in the final 1991 apportionment plan. The NAACP accepted BEDO's proposal for Cuyahoga County, establishing four majority-minority districts and one influence district in Cleveland. Mr. Tilling accepted the NAACP's recommendations for all minority districts in the remainder of the State. Mr. Tilling reviewed the proposals and accepted the same. (Defendants' Ex. 96, TR. 40, 49).

24. On October 1, 1991, BEDO offered the consensus position with regard to the districts in Cuyahoga County as an amendment to the BEDO plan (referred to herein as the "BEDO Amendment"). The BEDO Amendment was also offered as an amendment to the plan proposed by the majority of persons responsible for apportionment. (Defendants' Ex. 96, TR. 41). The amendment was accepted by the majority of persons responsible for apportionment and incorporated in the final 1991 Apportionment Plan. (Defendants' Ex. 96, TR. 40).

25. At the meeting of October 1, 1991, Dana Mattison and Senator Jeff Johnson endorsed the 1991 Apportionment Plan as respects Cuyahoga County. Floyd Johnson, on behalf of the NAACP, endorsed the entire 1991 Ap-

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[3] The deposition of Dana Mattison taken on November 26, 1991 is submitted as Defendants' Exhibit 82 and is hereinafter referred to as Defendants' Ex. 82.

portionment Plan. (Defendants' Ex. 96, TR. 40; Deposition of Floyd Johnson, Defendants Ex. 97, TR. 58; Transcript of Board Hearing, February 11, 1992; TR. 68; Deposition of Dana Mattison; Defendants' Ex. 82, TR. 83-89; Record of Public Hearing of October 1, 1991, TR. 26, submitted as a Joint Exhibit).

26. The BEDO Amendment was endorsed by William Mallory, President of BEDO and Congressman Stokes. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 89, 90). Defendants' Exhibit 24 is a letter from William Mallory to James Tilling dated October 1, 1991, confirming BEDO's support for the BEDO Amendment. (Defendants' Ex. 96, TR. 114).

27. The BEDO Amendment was also supported by Dr. Larry Brisker, consultant for minority interests to both BEDO and the Defendants (Plaintiffs' Ferguson and Quilter). Defendants' Exhibit 25 is a letter dated October 1, 1991 from Dr. Brisker to James Tilling supporting the BEDO Amendment. (Defendants' Ex. 96, TR. 114).

28. On October 12, 1991, the Ohio Conference of Branches of the NAACP unanimously endorsed the 1991 Apportionment Plan. (Deposition of Floyd Johnson, Defendants' Ex. 82, TR. 58).

29. In short, the 1991 Apportionment Plan, as respects minority districts, is fully endorsed by the Ohio Conference of Branches of the NAACP and is endorsed for Cuyahoga County by BEDO, BEDCO, Dr. Brisker, the minority consultant to Plaintiffs' Ferguson and Quilter, and Congressman Stokes of the 21st Congressional Caucus.

B. Detail of the 1991 Apportionment Plan

I. *Ohio Constitutional Requirements*

30. Defendants' Exhibits 10, 11 and 12 are copies of the relevant provisions of Article XI of the Ohio Constitution. (Defendants' Ex. 96, TR. 50-53). The Ohio

Supreme Court in *Voinovich v. Ferguson* (1992), —— Ohio St. 3rd —— held that the 1991 Apportionment Plan complies with Article XI of the Ohio Constitution.

Article XI, Section 10 addresses the creation and numbering of House Districts. Article XI, Section 10 provides:

> § 10 [Creation and numbering of house of representative districts.]
>
> The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representative districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.
>
> (C) Proceding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.
>
> (D) The remaining territory of the state shall be combined into representative districts. (As enacted

Nov. 7, 1967. Former § 10 repealed, see SJR 24, 107th General Assembly.)

Article XI, Section 10(A) and (B) first address the creation of whole county districts, that is districts to be created from a single county. Article XI, Section 10(C) then addresses the division of counties with more than one whole house ratio into districts, proceeding from the largest to the smallest county. Article XI, Section 10(D) then addresses the apportionment of the remainder of the State. (Defendants' Ex. 96, TR. 53).

32. In drafting the 1991 Apportionment Plan, Mr. Tilling followed the requirements of Article XI, Section 10 of the Ohio Constitution. (Defendants' Ex. 96, TR. 56).

33. Article XI, Section 7(D) addresses the possible retention of districts established in the preceding apportionment. Article XI, Section 7(D) provides:

> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent* with the requirements of Section 3 of this Article.
>
> (Emphasis added)

34. In drafting the 1991 Apportionment Plan, Mr. Tilling complied with the requirements of Article XI, Section 7(D). (Defendants' Ex. 96, TR. 142-143).

35. Article XI, Section 3 of the Ohio Constitution provides the population requirements of any house district. Article XI, Section 3 provides:

> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a

population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with Section 9 of this Article.

(Defendants' Ex. 10)

36. The ideal house of representatives population pursuant to Article XI, Section 3 of the Ohio Constitution is 109,567. (Defendants' Ex. 96, TR. 56).

37. Defendants' Exhibit 2 is a map of the Ohio house districts as configured in the 1981 apportionment. (Defendants' Ex. 96, TR. 50-53).

38. Defendants' Exhibit 3 is a map of the Ohio senate districts as configured in the 1981 apportionment. (Defendants' Ex. 96, TR. 50-53).

39. Defendants' Exhibit 4 is a map of the Ohio house districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, TR. 50-53).

40. Defendants' Exhibit 5 is a map of the Ohio senate districts as configured in the 1991 Apportionment Plan as adopted (Defendants' Ex. 96, Tr. 50-53).

41. Defendants' Exhibit 6 is a colorized map showing Ohio house districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, TR. 50-53).

42. Defendants' Exhibit 7 is a colorized map showing Ohio senate districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, Tr. 50-53).

43. Defendants' Exhibit 8 is a colorized map showing Ohio house districts as proposed by Plaintiffs' Ferguson and Quilter in the 1991 Minority Plan as proposed. (Defendants' Ex. 96, TR. 50-53).

44. Defendants' Exhibit 9 is a colorized map showing Ohio senate districts as proposed by Plaintiffs Ferguson and Quilter in the 1991 Minority Plan as proposed. (Defendants' Ex. 96, Tr. 50-53).

45. Defendants' Exhibit 57 displays the 1981 house districts with 1990 census population. This exhibit demonstrates that the vast majority of the 1981 districts must be reconfigured because the population of such districts fails to satisfy Article XI, Section 3 of the Ohio Constitution.

46. Defendants' Exhibit 13 provides the population for each house and senate district as established in the 1991 Apportionment Plan. With the exception of H.D. 68 and S.D. 32, which will be discussed, each house and senate district complies with the population requirements of Article XI, Sections 3, 4 and 9 of the Ohio Constitution. (Defendants' Ex. 96, Tr. 56).

47. Defendants' Exhibit 14 provides the population of each house and senate district as proposed by Messrs. Ferguson and Quilter in the 1991 Minority Plan as proposed. (Defendants' Ex. 96, TR. 56).

48. Defendants' Exhibit 54 displays the 1981 senate districts with 1990 census populations. (Defendants' Ex. 96, TR. 78).

49. Defendants' Exhibit 55 displays the 1990 populations for 1991 senate districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, Tr. 79). Defendants' Exhibit 56 displays the same information for senate districts as proposed by Messrs. Ferguson and Quilter in the proposed 1991 Minority Plan. (Defendants' Ex. 96, TR. 79).

50. Pursuant to Article XI, Section 10(C), Mr. Tilling proceeded to create districts from whole counties in the following order: Cuyahoga, Franklin, Hamilton, Summit, Lucas, Stark and Mahoning Counties. (Defendants' Ex.

96, Tr. 61). There is no dispute concerning this order of procession in creating house districts.

2. *Population Requirements of Major Urban Counties*

51. As indicated in the 1990 census, the total population of Ohio remained at approximately 10 million people, virtually the same as in the 1980 census. Ohio experienced only a net gain of population of 50,000 people. However, there were significant population shifts within the state. Specifically, there occurred a substantial shift in population from the Northeast quadrant of the state to the Central and Southwest portions of the state, particularly to Franklin, Delaware, Union and Madison counties. There also occurred a population shift from Cincinnati and Hamilton County to Butler, Clermont and Warren counties. Cuyahoga County lost one entire house district in population (109,000 people) while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous county in the state. There were also significant population shifts from the inner cities to the suburbs. (Defendants' Ex. 96, Tr. 61-63).

52. As a result of major population shifts within counties and from the inner city to the suburbs, the vast majority of the 1981 configured districts in all major urban areas had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution. Defendants' Exhibit 58 displays the 1981 house districts with 1990 census population with an explanation of whether the district meets the requirements of Article XI, Section 3, is too high or is too low. (Defendants' Ex. 96, TR. 79). Defendants' Ex. 58 indicates the following:

1981 APPORTIONMENT HOUSE DISTRICTS WITH 1990 CENSUS POPULATION FOR MAJOR URBAN COUNTIES

ARTICLE XI, SECTION 3 IDEAL HOUSE DISTRICT POPULATION—109,567 RANGE—104,089-115,045			ARTICLE XI, SECTION 3 REQUIREMENTS
		CUYAHOGA COUNTY	
6	113,674		Meets requirements
7	107,304		Meets requirements
8	100,798		Too low
9	100,461		Too low
10	108,686		Meets requirements
11	96,086		Too low
12	84,098	(James)	Too low
13	104,883		Meets requirements
14	91,972	(Prentiss)	Too low
15	99,173		Too low
16	96,258	(Whalen)	Too low
17	107,097		Meets requirements
18	101,314		Too low
19	100,333		Too low
		HAMILTON COUNTY	
20	122,802		Too high
21	99,465		Too low
22	108,124		Meets requirements
23	97,630	(Mallory)	Too low
24	102,789		Too low
25	99,765	(Rankin)	Too low
26	119,239		Too high
27	116,413		Too high
		FRANKLIN COUNTY	
28	116,369		Too high
29	106,537	(Miller)	Meets requirements
30	118,913		Too high
31	97,764	(Beatty)	Too low
32	111,070		Meets requirements
33	115,186		Too high
34	138,011		Too high
35	157,601		Too high

ARTICLE XI, SECTION 3 IDEAL HOUSE DISTRICT POPULATION—109,567 RANGE—104,089-115,045			ARTICLE XI, SECTION 3 REQUIREMENTS
		MONTGOMERY COUNTY	
36	115,907	(McLin)	Too high
37	108,769	(Roberts)	Meets requirements
38	116,087		Too high
39	106,321		Meets requirements
40	118,434		Too high
		SUMMIT COUNTY	
41	107,879		Meets requirements
42	105,536	(Sykes)	Meets requirements
43	108,031		Meets requirements
44	113,743		Meets requirements
		LUCAS COUNTY	
45	107,825	(Jones)	Meets requirements
46	108,701		Meets requirements
47	102,736		Too low
48	121,371		Too high

53. As indicated in Defendants' Exhibit 58:

a) Nine (9) out of the fourteen (14) districts in Cuyahoga County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 8, 9, 11, 12, 14, 15, 16, 18 and 19. These districts include all districts represented by minority incumbents (H.D. 12 (James), 15 (Prentiss) and 16 (Whalen)). The remaining districts (H.D. 6, 7, 11, 13 and 17) cannot be retained intact given the population requirements of the other districts. (Defendants' Ex. 96, Tr. 91).

b) Seven (7) out of the eight (8) districts in Hamilton County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 20, 21, 23, 24, 25, 26, and 27. These districts include the two districts represented by minority incumbents (H.D. 23 (Mallory) and H.D. 24 (Rankin)). The remaining district (H.D. 22) cannot be retained intact because of the population requirements of the other districts. (Defendants' Ex. 96, Tr. 83).

c) Six (6) out of the eight (8) districts in Franklin County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 28, 30, 31, 33, 34 and 35. These districts include the district represented by minority incumbent Otto Beatty (H.D. 31). The two remaining districts cannot be retained intact because of the population requirements of the other districts. (Defendants' Ex. 96, TR. 84-86).

d) Three (3) out of the five (5) districts in Montgomery County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 36, 38 and 40. These districts include the district represented by minority incumbent McLin (H.D. 36). The remaining dis-

tricts cannot be retained intact because of the population requirements of the other districts. (Defendants' Ex. 96, Tr. 87-88).

e) In Summit County, all districts (H.D. 41-44) meet the population requirements of Article XI, Section 3. These districts were reconfigured to avoid splitting the black community in Summit County and to avoid minority voter dilution. (Defendants' Ex. 96, TR. 89).

f) In Lucas County, two (2) out of four (4) districts do not meet the requirements of Article XI, Section 3. These districts are H.D. 47 and 48. The remaining districts, including H.D. 45 represented by minority incumbent Jones, cannot be retained intact because of population requirements of other districts and to avoid minority voter dilution. (Defendants' Ex. 96, TR. 89-90).

3. *Reconfiguration of Minority Districts-Voting Rights Act Considerations*

54. Defendants' Exhibits 15, 16 and 17 are comparisons of black population by district as configured in the 1981 apportionment, the 1991 Apportionment Plan (the 1991 Majority Plan) and the 1991 apportionment plan as proposed Messrs. Ferguson and Quilter and BEDO (the 1991 Minority Plan). Defendants' Exhibit 17 is a comprehensive comparison of all these apportionment plans. The percentages are based on both black population and black voting age population. (Defendants' Ex. 96, TR. 59). Defendants' Exhibit 17 indicates the following:

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 1991 MAJORITY APPORTIONMENT PLAN AND 1991 MINORITY APPORTIONMENT PLAN

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
6-19 Cuyahoga	**8-20 Cuyahoga**		**6-18 Cuyahoga**	
16—94.67% [1]	10—63.42% [2]	67.35% [1]	12—67.08% [2]	70.81% [1]
14—90.05%	12—65.13%	67.25%	16—66.67%	69.17%
12—74.80%	8—61.41%	65.64%	14—63.71%	68.20%
15—34.80%	9—58.36%	62.30%	13—60.18%	63.86%
17—26.14%	11—40.61%	43.01%	15—26.46%	27.89%
18—14.70%	14— 6.86%	7.92%	11— 7.32%	8.54%
19—14.40%	19— 3.71%	4.63%	18— 6.03%	6.87%
13— 4.99%	15— 3.25%	3.29%	9— 5.14%	6.05%
11— 4.44%	17— 2.34%	2.85%	17— 2.97%	3.12%
9— 4.16%	13— 2.32%	2.75%	7— 2.19%	2.62%
7— 2.36%	18— 1.31%	1.41%	8— 1.16%	1.23%
8— 2.12%	16— 0.45%	0.47%	10— 0.49%	0.66%
10— 0.64%	20— 0.23%	0.31%	6— 0.44%	0.47%
6— 0.49%				
28-35 Franklin	**21-29 Franklin**		**19-26 Franklin**	
31—46.80%	21—50.30%	55.92%	21—50.60%	53.85%
29—38.50%	22—44.31%	48.29%	19—46.40%	50.80%
32—26.60%	26— 8.07%	8.66%	20—10.88%	12.45%
30—12.40%	25— 7.96%	8.41%	22— 6.61%	7.04%
28— 5.90%	23— 7.78%	8.32%	26— 5.23%	5.99%
34— 5.10%	29— 4.47%	4.32%	24— 4.15%	5.08%
33— 4.10%	24— 3.92%	4.22%	23— 4.78%	4.79%
35— 1.40%	28— 3.56%	3.75%	25— 1.49%	1.62%
	27— 3.09%	3.57%		
20-27 Hamilton	**30-37 Hamilton**		**27-34 Hamilton**	
25—53.20%	30—56.83%	61.07%	28—57.91%	61.26%
23—45.90%	31—52.60%	59.82%	33—47.10%	55.49%
24—32.30%	32—21.58%	24.00%	34—19.55%	21.67%
22—12.60%	35— 7.91%	8.96%	32—16.71%	18.46%
27—12.20%	33— 7.50%	8.04%	31— 3.55%	4.39%
20— 8.90%	36— 4.08%	4.49%	30— 3.26%	3.96%
21— 7.50%	37— 1.94%	2.14%	27— 3.11%	3.46%
26— 2.70%	34— 1.90%	2.14%	29— 2.30%	2.53%

[1] Black percentage of total population

[2] Black Voting Age Population

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 1991 MAJORITY APPORTIONMENT PLAN AND 1991 MINORITY APPORTIONMENT PLAN (CONTINUED)

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
36-40 Montgomery	38-43 Montgomery		35-39 Montgomery	
36—42.10%	38—50.70%	54.78%	36—45.26%	47.63%
37—36.10%	39—29.23%	32.35%	37—36.20%	40.79%
40— 6.20%	43— 3.61%	3.86%	35— 3.62%	4.23%
39— 4.70%	40— 2.84%	3.30%	39— 2.71%	3.21%
38— 0.91%	42— 2.28%	2.76%	38— 0.99%	1.09%
	41— 1.18%	1.31%		
41-44 Summit	44-48 Summit		40-43 Summit	
42—35.40%	44—39.52%	43.26%	42—43.09%	47.20%
44— 9.00%	45— 5.40%	6.29%	41— 3.81%	4.25%
43— 2.90%	47— 5.00%	6.00%	43— 2.54%	2.88%
41— 2.30%	46— 1.12%	1.33%	40— 2.24%	2.54%
	48— 0.61%	0.53%		
45-48 Lucas	49-52 Lucas		44-47 Lucas	
45—41.70%	49—47.65%	50.92%	45—44.98%	50.12%
47—13.20%	52— 4.85%	5.65%	46— 4.70%	5.73%
46— 5.30%	50— 4.23%	5.46%	47— 4.16%	5.22%
48— 2.80%	51— 2.18%	2.40%	44— 3.02%	3.34%
49-51 Stark	54-57 Stark		48-50 Stark	
50—14.90%	54—12.93%	15.15%	50—12.49%	14.49%
49— 4.43%	55— 3.39%	3.84%	49— 3.43%	3.84%
51— 1.30%	57— 2.64%	2.98%	48— 3.08%	3.52%
	56— 1.15%	1.20%		
52-53 Mahoning	64-65 Mahoning		55-56 Mahoning	
53—27.80%	64—31.19%	35.53%	55—31.19%	35.53%
52—10.50%	65— 1.48%	1.64%	56— 1.44%	1.60%
Total (Minority Districts Over 10%)				
24	16	16	18	18
Total (Minority—Majority (Over 50%))				
4	8	9	6	9

55. In Cuyahoga County, the 1991 Apportionment Plan has four (4) majority-minority districts with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with black population of 74.80%, 90.05% and 94.67%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%. (Defendants' Ex. 17).

56. Additionally, the 1991 Apportionment Plan creates a strong influence district in Cuyahoga County of 40.61% compared to an influence district of only 26.46% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. (Defendants' Ex. 17).

57. As discussed above, BEDO and the NAACP have both endorsed the 1991 Apportionment Plan as respects Cuyahoga County. BEDO Executive Director Dana Mattison supports the 1991 Apportionment Plan for Cuyahoga County given racial bloc voting in the county, the major population drifts from the inner city to the suburbs of Cleveland and low minority voter turnout in Cleveland. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 14-16).

58. In Franklin County, the 1991 Apportionment Plan has one (1) majority-minority district at 50.30% black voting age population where none existed in the 1980 apportionment. The 1991 Apportionment Plan also has a strong influence district at 44.31%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter also has one (1) majority-minority district at 50.60% black voting age population and one influence district at 46.40%. (Defendants' Ex. 17). Significantly, part of the rationale of increasing relative black percentages in Franklin County house districts from the 1981 plan was to create a Senate influence district in Franklin County. (Deposition of Tilling, Defendants' Ex. 96, TR. 103).

59. BEDO specifically recommended an *increase* from the 1981 Plan in black population percentages in the two districts in Franklin County currently represented by Representatives Miller and Beatty to avoid minority vote dilution under the Voting Rights Act. Mr. Mattison testified:

> Q. So you increased Ray Miller's district more than the majority did in adopting the 91 plan?
>
> A. In this particular case.
>
> Q. Well, tell me generally why you went from 38 to 50 percent in Ray Miller's district?
>
> A. Well again we looked at the totality of circumstances, looked at a number of issues and came to the conclusion that these were the figures necessary again to comply with our understanding of the Voting Rights Act.
>
> (Deposition of Dana Mattison, December 11, 1991, Defendants' Ex. 98, TR. 58).[4]

60. In Hamilton County, the 1991 Apportionment Plan creates two (2) majority-minority districts where only one existed in the 1981 apportionment. The majority-minority districts in the 1991 Apportionment Plan have a black voting age population of 52.60% and 56.83%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter also reflects one (1) majority-minority district at 57.91%. The 1991 Apportionment Plan also reflects an influence district of 21.58% compared to 19.55% in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter.

61. BEDO supported an *increase* in black population in both districts represented by minority incumbents, Representatives Mallory and Rankin, even though these incumbents have been elected over the years.

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[4] The deposition of Dana Mattison taken December 11, 1991 is submitted as Defendants' Ex. 98.

Q. Now going back to Hamilton County just briefly, for a second, same situation. Rankin and Mallory have been representatives elected over a long period of time and yet you increased the percentage of black population.

A. Uh-hum.

Q. Why is that?

A. Again, this is an individual district by district examination. We believe that communities respond differently based on a whole range of circumstances. Again, understand that Representative Rankin came to that district after her husband passed away, and there is a long-standing relationship with voters, but that does not mean that the trends indicate that that's going to continue over time, *and what we tried not to do was to construct districts based on incumbents. That's just not the reasonable thing to do.*

(Emphasis added; Deposition of Mattison, Defendants' Ex. 98, TR. 72)

62. In Montgomery County, the 1991 Apportionment Plan reflects one (1) majority-minority district where none existed in the 1981 apportionment. The 1991 Apportionment Plan has a district with a black voting age population of 50.70% and an influence district at 29.23%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter has no majority-minority districts and two influence districts at 36.20% and 45.26%. (Defendants' Ex. 17).

63. In Montgomery County, Representative McLin's district (H.D. 36) exceeds the population requirements of Article XI, Section 3 of the Ohio Constitution. However, blacks are migrating from Representative McLin's district to Representative Robert's district so that, over time, McLin's district will lose black population and Robert's district will gain black population. Mr. Tilling recognized this population drift in his configuration of

districts in Montgomery County. (Defendants' Ex. 96, TR. 87).

64. Both BEDO and the Minority (Ferguson and Quilter) also recognized these population shifts in configuring districts in Montgomery County in their respective plans. (Deposition of Mattison, Defendants' Ex. 98, TR. 70).

65. Floyd Johnson, representing the NAACP, endorsed the 1991 Apportionment Plan as respects the configuration of all the minority districts in the 1991 Apportionment Plan, specifically those minority districts in Montgomery County. Mr. Johnson acknowledged that population shifts in Montgomery County required increases in black population in Representative McLin's district in order to maintain McLin's district as a minority district. Further, with the construction of the Trotwood corridor in the construction of Highway 35, black population would be displaced from Representative McLin's district. (Deposition of Johnson, Defendants' Ex. 82, TR. 46-48).

66. In Summit County, the 1991 Apportionment Plan reflects a slight increase in black population in H.D. 42, the district currently represented by minority incumbent Representative Sykes. The increase is from 35.40% to 43.26% black population. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter also increases the black population in Representative Sykes' district from 35.40% to 47.20%. (Defendants' Ex. 17).

67. Mr. Tilling increased black population in Representative Sykes' district to avoid minority voter dilution since the district is losing black population. (Defendant's Ex. 96, TR. 89). This was endorsed by Floyd Johnson for the NAACP. (Deposition of Johnson, Defendants' Ex. 82, TR. 50). BEDO also increased the percentage of black population in Sykes' district from 35.40% to 47.20% based on the same analysis. (Deposition of Mattison, Defendants' Ex. 98, TR. 74).

68. In Lucas County, the 1991 Apportionment Plan also reflects an increase in black population in H.D. 45, the district currently represented by minority incumbent Representative Casey Jones. The black voting age population in Jones' district was increased to 47.65% compared to 44.98% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter as proposed. (Defendants' Ex. 17). While Plaintiffs challenge House Districts 45 and 47 in Lucas County, the black populations in these districts are substantially similar in the 1991 Apportionment Plan and in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

69. BEDO's plan increased the black population in Representative Jones' district due to population shifts in the district and because an expansion of the University of Toledo will displace black population. (Deposition of Mattison, Defendants' Ex. 98, TR. 80). Mr. Tilling employed the same rationale to the configuration of this district in Lucas County in the 1991 Apportionment Plan. (Defendants' Ex. 96, TR. 89-90).

70. In Stark County, there is not sufficient black population to form a majority-minority district and there are no material differences in the configuration of districts in any plan. (Defendants' Ex. 17).

71. The districts in Mahoning County are configured pursuant to the order of the Federal District Court in *Armour v. State of Ohio*, No. 88-1104Y (N.D.Ohio Sept. 4, 1991).

72. Overall, there are eight (8) majority-minority districts in the 1991 Apportionment Plan compared to only four (4) in the 1981 apportionment and six (6) in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Defendants' Ex. 17 and 20; Defendants' Ex. 96, TR. 114).

Defendants' Exhibit 20 provides:

COMPARISON OF HOUSE DISTRICTS
WITH BLACK VAP OVER 50% IN 1991
MAJORITY AND MINORITY APPORTIONMENT PLANS

House District	1991 Majority Plan	House District	1991 Minority Plan
12	65.13	12	67.08
10	63.42	16	66.67
8	61.41	14	63.71
9	58.36	13	60.18
30	56.83	28	57.91
31	52.60	21	50.60
38	50.70		
21	50.30		
TOTAL	8		6

73. Further, there is no relative reduction in the number of districts with over 10% black voting age population. In the 1991 Apportionment Plan, there are twenty (20) districts with over 10% black voting age population, precisely the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. (Defendants' Ex. 18; Defendants' Ex. 96, TR. 113).

Defendants' Exhibit 18 provides:

COMPARISON OF HOUSE DISTRICTS
WITH BLACK VAP OVER 10% IN 1991
MAJORITY AND MINORITY APPORTIONMENT PLANS

House District	1991 Majority Plan	House District	1991 Minority Plan
12	65.13	12	67.08
10	63.42	16	66.67
8	61.41	14	63.71
9	58.36	13	60.18
30	56.83	28	57.91
31	52.60	21	50.60
38	50.70	33	47.10
21	50.30	19	46.40
49	47.65	36	45.26
22	44.31	45	44.98
11	40.61	42	43.09
44	39.52	37	36.20
64	31.19	55	31.19
39	29.23	15	26.46
32	21.58	34	19.55
61	13.81	32	16.71
54	12.93	50	12.49
73	10.76	61	10.92
66	10.32	20	10.88
1	10.07	1	10.07
TOTAL	20		20

74. Both BEDO and NAACP recognize that increasing the black population in certain districts will result in a marginal reduction in black population in other districts. It is not possible to increase the minority population of some districts without reducing it in others. Dana Mattison, for example, testified:

Q. Why didn't BEDO maintain minority districts as they were in 1980 with a spread of black population of 12.20% up to 53% as opposed to creating two districts at 47 and 57 percent [in Hamilton County] and taking black population from the remaining districts?

A. Well, primarily because of our understanding of totality of circumstances much of which was new to the political arena vis-a-vis the 1982 amendments to the Voting Rights Act that wasn't present in 1980, and based on our assessment these were the numbers that were required to comport with our understanding of the requirements.

Q. But the effect of doing that, Mr. Mattison, is to reduce the black population in the remaining districts in Hamilton County?

A. That's what happens when you've got too few African-Americans in a district based again on totality of circumstances and they got to come from somewhere.

(Deposition of Mattison, Defendants' Ex. 98, TR. 56)

75. The 1991 Apportionment Plan doubles the number of majority-minority districts in Ohio while maintaining the same relative composition of black population in the current districts represented by minority incumbents.

76. Defendants' Exhibit 21 reflects the percentage change in black population in districts currently served by minority incumbents. Three districts in Cuyahoga County with a black population of 74.8%, 90.1% and 94.6% under the 1981 Apportionment Plan were reduced to 65.6%, 67.0% and 67.0% black population. This was done to avoid diluting minority voting strength. The packing of minority population into super majority-minority districts as found in the 1981 Apportionment Plan dilutes minority voting power. Seven (7) districts,

however, were increased in black population. (Defendants' Ex. 21). Defendants' Exhibit 21 provides:

PERCENTAGE POPULATION OF HOUSE DISTRICTS WITH MINORITY REPRESENTATIVES

Current State Representative	1981 House District Number	1981 Percent Black Population	1991 House District Number	1991 Percent Black	Percentage Change
Troy James	12	74.8%	10	67.0%	− 7.8
C.J. Prentiss	14	90.1%	8	65.6%	−24.5
Vermel Whalen	16	94.6%	12	67.0%	−27.6
William Mallory	23	45.9%	31	59.7%	+13.8
Helen Rankin	25	53.2%	30	60.9%	+ 7.7
Ray Miller	29	38.5%	21	55.7%	+17.2
Otto Beatty	31	46.8%	22	48.0%	+ 1.2
Rhine McLin	36	42.1%	38	54.6%	+12.5
Tom Roberts	37	36.1%	39	32.2%	− 3.9
Vernon Sykes	42	35.4%	44	43.0%	+ 7.6
Casey Jones	45	41.7%	49	50.0%	+ 8.3

77. All elevent (11) districts currently served by minority incumbents remain strongly Democratic districts in the 1991 Apportionment Plan. (Defendants' Ex. 59).

Defendants' Exhibit 59 provides:

POLITICAL STRENGTH OF MINORITY INCUMBENTS—1991 APPORTIONMENT PLAN

1981 House District	Incumbent	Political Index	1991 House District	Political Index	Result
12	Troy James	80.15	10	79.04	Strongly Democratic
14	C.J. Prentiss	84.83	8	75.23	Strongly Democratic
16	Vermel Whalen	87.18	12	78.88	Strongly Democratic
23	William Mallory	65.74	31	69.28	Strongly Democratic
25	Helen Rankin	66.74	30	74.68	Strongly Democratic
29	Ray Miller	62.97	21	76.50	Strongly Democratic
31	Otto Beatty	66.33	22	69.35	Strongly Democratic
36	Rhine McLin	64.40	38	75.63	Strongly Democratic
37	Tom Roberts	62.52	39	64.40	Strongly Democratic
42	Vernon Sykes	58.64	44	72.21	Strongly Democratic
45	Casey Jones	64.99	49	77.64	Strongly Democratic

78. Robert Dykes prepared the apportionment plan submitted by Messrs. Ferguson and Quilter (the "1991 Minority Plan"). Dykes also prepared the 1981 Apportionment Plan for Messrs. Ferguson and Quilter, which plan a federal court held was drafted with the intent to dilute minority voting strength. *Armour v. Ohio*, No. 88-1104Y (N.D.Ohio Sept. 4, 1991). The *Armour* Court also found Dykes' 1981 plan had effectively diluted minority voting strength.

79. Dykes conducted no analysis of the requirements of the Voting Rights Act, no analysis of racial bloc voting and no analysis of the "totality of the circumstances" in establishing minority districts in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Deposition of Dykes, November 21, 1991, Defendants' Ex. 80, TR. 65, 72, 74, 75, 128, 204).[5]

80. Instead, Dykes relied totally on the recommendations of BEDO and Dr. Larry Brisker, the Minority's (Ferguson and Quilter's) consultant. Accordingly, the BEDO apportionment plan and the plan submitted by Messrs. Ferguson and Quilter are identical. Plaintiffs themselves increased the percentage of black population in all districts served by minority incumbents as recommended by BEDO. (Deposition of Dykes, Defendants' Ex. 80, TR. 62, 63, 67, 108, 113, 125, 129, 158, 160, 167, 170).

81. Gordon Henderson (Plaintiffs' expert in *Quilter v. Voinovich*) likewise performed no analysis of the requirements of the Voting Rights Act or the "totality of circumstances" factors. (Deposition of Gordon Henderson, December 12, 1991, Defendants' Ex. 99, TR. 93).[6]

82. Although Mr. Henderson performed no Voting Rights Act analysis in this case, his first principle in apportionment is to avoid diluting minority voting strength. (Defendants' Ex. 99, TR. 8).

83. Mr. Henderson's position is that an apportioning body must create majority-minority districts whenever possible and must always maintain or enhance minority voting strength. (Defendants' Ex. 99, TR. 83, 91). Mr. Henderson testified:

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[5] The deposition of Robert Dykes taken on November 21, 1981 is submitted as Defendants' Ex. 80.

[6] The deposition of Gordon Henderson taken on December 12 is submitted as Defendants' Ex. 99.

Q. That is a good point, anybody engaged in apportionment must avoid minority voter dilution. Is that what I just heard you say?

A. Yes.

Q. And they must do that affirmatively, isn't that true?

A. Well, I don't see how you do it, if not affirmatively.

Q. Good. And deliberately, isn't that true?

A. All right.

Q. You agree with that?

A. I can buy that.

(Defendants' Ex. 99, TR. 114).

84. Mr. Henderson agreed that there should be changes in the existing 1981 districts to avoid minority vote dilution. He testified:

Q. Is it your position that there should be no change in the existing districts in order to avoid minority vote dilution?

A. Oh no, no, not at all.

(Defendants' Ex. 99, TR. 202)

85. Further, Mr. Henderson did not criticize the 1991 Apportionment Plan merely because of the number of districts with black population of 10% or more. He testified:

Q. You're not criticizing the majority plan simply because of the number of districts with black population of 10% or more?

A. As such?

Q. Right?

Q. Oh no, not at all. Not at all.

(Defendants' Ex. 99, TR. 170)

C. Totality of Circumstances

1. *Geographical Cohesion of Minority Communities*

86. Significant minority populations in all major urban counties are geographically compact and contiguous. (Defendants' Exs. 26, 30, 34, 38, 42, 46, and 50; Defendants' Ex. 96, TR. 53-76).

87. The districts created in the 1991 Apportionment Plan are geographically compact and contiguous. Defendants' Exhibits 27-29 (Cuyahoga), 31-33 (Franklin), 35-37 (Hamilton), 39-41 (Montgomery), 43-45 (Summit), 47-49 (Lucas) and 51-53 (Mahoning); Defendants' Ex. 96, TR. 66-77).

2. *Political Cohesion*

88. All minority districts in the 1991 Apportionment Plan are politically cohesive. Blacks tend to vote for democratic candidates by a substantial majority. (Defendants' Ex. 96, TR. 64).

3. *Racial Bloc Voting*

89. Gordon Henderson (Plaintiffs' Expert in *Quilter v. Voinovich*) purported to have conducted a regression analysis of racial bloc voting but only for the eleven (11) house districts currently served by minority incumbents. Mr. Henderson reviewed only eleven (11) House races in 1990. Mr. Henderson presented no support of his regression analysis and provided no standard deviations for his analysis. (Defendants' Ex. 99, TR. 17).

90. Mr. Henderson reviewed only one (1) district (Shaker Heights) out of ninety-nine (99) in the Jesse Jackson campaign. He found no racial bloc voting in the 1988 Jesse Jackson campaign based on his review of only one (1) district. (Defendants' Ex. 99, TR. 13).

91. Mr. Henderson reviewed no primary election data. (Defendants' Ex. 99, TR. 78).

92. A review of Henderson Exhibit 3 indicates that there is evidence of racial bloc voting in the eleven (11) districts served by minority incumbents. Based on 1990 election results, for example, in H.D. 29, 55% of white voters did not vote for the black Democratic candidate in a heavily Democratic district. In. H.D. 36, 97% of blacks voted for the black candidate, 65% of white voters did not. In H.D. 37, 95% of black voters voted for the black candidate, 54% of the white voters did not. In H.D. 42, 95% of black voters voted for the black candidate, 52% of white voters did not. (Henderson Exhibit 3).

93. In preparing the 1991 Apportionment Plan, Mr. Tilling considered election returns for house and senate and statewide races from 1982 through 1990. He also considered the Jesse Jackson primary campaign for President. Mr. Tilling did a precinct-by-precinct review and found significant evidence of racial bloc voting statewide. (Defendants' Ex. 96, TR. 91).

94. Defendants' Exhibit 70 is a compilation of Statewide Election Results—Precinct by Precinct for 1982, 1984, 1986, 1988 and 1990.

95. Defendants' Exhibit 71 is a compilation of Ohio House and Senate Election Results—Precinct by Precinct for 1982, 1984, 1986 and 1988.

96. Defendants' Exhibit 72 is a compilation of Miscellaneous Local Election Races for a variety of years.

97. Defendants' expert, Dr. Gary King, is Professor of Government at Harvard University and is Director of the Harvard Data Center. Dr. King is a political scientist and statistician, specializing in quantitative methods and application of quantitative methods to redistricting. Dr. King received his Ph.D from the University of Wisconsin in 1984. Dr. King has published extensively in the area of apportionment in such scholarly journals as the *American Journal of Political Science*, the *Journal of the American Statistical Association* and *American Politics Quar-*

terly. Dr. King has received numerous grants and awards including those from the National Science Foundation, the Smith Richardson Foundation and the Citizen Participation in Government Foundation. Dr. King is an editorial board member of the *Journal of Politics*, the *Public Opinion Quarterly*, *The American Journal of Political Science* and other journals. Dr. King has lectured extensively in the area of political science and apportionment. (Deposition of Dr. Gary King, December 13, 1991. Defendants' Ex. 95, TR. 5, 6; Defendants' Ex. 85).[7]

98. Gordon Henderson (Plaintiffs' expert in *Quilter v. Voinovich*) has never written or published anywhere on apportionment, redistricting, gerrymandering, racial bloc voting, or minority voting rights.

99. Dr. King analyzed over 200 elections from 1982 through 1990. Dr. King conducted a bivariate ecological regression analysis and determined that *all* the data indicated significant racially polarized voting. (Defendants' Ex. 95, TR. 40).

100. Defendants' Exhibits 92 and 93 indicate the results of Dr. King's analysis of elections to determine the existence of racially polarized voting. The elections analyzed included presidential races, congressional races, house and senate races, statewide office races and local elections. Election results were analyzed by precinct. Every result indicated a significant degree of racially polarized voting. (Defendants' Ex. 95, TR. 40; Defendants' Exs. 91 and 93). Dr. King also testified regarding the absence of partisan bias before the entire Apportionment Board on February 11, 1992.

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[7] Dr. King's deposition taken on December 13, 1991 is submitted as Defendants' Ex. 95. Dr. King testified at the February 11, 1992 Apportionment Board hearing where he reaffirmed his deposition testimony and the testimony before the Federal District Court on December 17, 1991 and offered further supporting testimony on racial bloc voting and partisan bias.

101. Dr. King verified the results of his bivariate ecological regression analysis by conducting a homogeneous precinct analysis and an analysis based on an aggregated compound multinomial model. These analyses confirmed the results of the bivariate ecological regression analysis. (Defendants' Ex. 95, TR. 44).

102. Dr. King testified that Mr. Henderson's review of Jesse Jackson election data from only one (1) out of ninety-nine (99) districts was not a statistically reasonable basis upon which to draw conclusions on racial bloc voting in Ohio. (Defendants' Ex. 95, TR. 47).

103. Dr. King also testified that Henderson Exhibit 3 was not a regression analysis, was not supported and provided no indication by standard errors of the degree of certainty of the analysis. Even if acceptable, Henderson Exhibit 3 reflects significant racial bloc voting. (Defendants' Ex. 95, TR. 49, 50).

104. Dr. King testified that simply because black Democrats vote for a Democrat does not indicate that the candidate is the candidate of choice for minorities since there is no analysis of any primary in Henderson's analysis and no analysis of whether the eventual candidate is the candidate of choice. (Defendants' Ex. 95, TR. 51).

4. *Totality of Circumstances*

105. Robert Dykes and Gordon Henderson, Plaintiffs' experts in *Quilter v. Voinovich*, have offered no evidence whatsoever regarding "totality of circumstances" factors established in *Thornburg v. Gingles* as factors to be considered in a Section 2 claim. (Deposition of Dykes, Defendants' Ex. 80, TR. 65, 72, 74, 75, 128 and 204; Deposition of Henderson, Defendants' Ex. 99, TR. 93).

106. In drafting the 1991 Apportionment Plan, Mr. Tilling reviewed totality of circumstances factors to determine the reasonableness of the minority districts created. (Defendants' Ex. 96, TR. 96-113).

a. *History of Official Discrimination*

107. There exists evidence of a history of official discrimination in the State of Ohio and local political subdivisions that touched the rights of minorities to participate in the democratic process.

108. The 1981 apportionment plan was held to unlawfully dilute minority voting strength in *Armour v. State of Ohio*, Case No. C88-1104Y (Slip Op. dated 9/4/91).

109. The 1981 apportionment plan diluted minority voting strength in that the plan revealed in only four (4) majority-minority districts in Ohio, three (3) of which were in Cuyahoga County. (Defendants' Ex. 17).

110. Until 1991, when the Republicans constituted a majority of persons responsible for apportionment, minorities did not effectively participate in the state apportionment process. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 95).

111. Dana Mattison, Executive Director of BEDO, testified that the 1981 apportionment plan "fragmented" minority voting strength. He testified:

> Q. Would you say that the 1981 apportionment on occasion in some districts packed minority voting strength?
>
> A. No, I didn't find the issue of packing to be an issue much more of slicing.
>
> Q. Fragmenting?
>
> A. Yeah.

(Defendants' Ex. 82, TR. 33)

112. Mr. Mattison found that in the 1981 apportionment, the effects of discrimination led to unreasonably high percentages of blacks in urban districts in Cleveland due to urban flight, discrimination and immobility of the black population. (Deposition of Mattison, Defendants' Ex. 82, TR. 37).

113. Mr. Mattison also found evidence of "fragmenting" black population in Youngstown, Mansfield, Akron, Toledo, Franklin County and generally throughout the major urban counties in Ohio. (Defendants' Ex. 82, TR. 37-40). He testified:

> Q. Okay. But you looked at those issues in Franklin, Hamilton, Montgomery, Summit, Lucas, Stark, Mahoning and Cuyahoga Counties?
>
> A. We looked at them in all of them, all the counties.
>
> Q. All right, very good. And you reconfigured districts in all those counties because of either packing or fragmenting or other concerns?
>
> A. Or other concerns, yes.
>
> (Defendants' Ex. 82, TR. 40).

114. There are numerous reported cases in Ohio and in the Sixth Circuit finding minority discrimination in police and fire departments, in education, in housing, in elections, in state contracting, in employment and in zoning practices. (Defendants' Ex. 66). These cases include:

MINORITY DISCRIMINATION CASES

1. *Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) (Court approved consent decree entered to remedy discrimination against blacks and Hispanics in promotion and advancement practices within City of Cleveland Fire Department).

2. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (Dayton Board of Education intentionally operated racially segregated school system).

3. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) (Columbus Board of Education intentionally operated racially segregated school system).

4. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) (City of Akron discriminated against minorities by amending city charter to require voter approval of any ordinance dealing with discrimination in housing).

5. *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991) (Ohio Governor, Ohio Secretary of State, and Members of Hamilton County Board of Elections conceded that at-large election of Hamilton County Municipal Court Judges unlawfully diluted minority voting strength under § 2 of the Voting Rights Act).

6. *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986) (Court affirmed order enforcing consent decree which was designed to remedy "past practices [which] might give rise to 'an inference of a pattern or practice of discrimination'" on the basis of race within the Cincinnati Fire Department), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987).

7. *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983) (State of Ohio properly enacted statute setting aside a percentage of state contracts for award to minority business enterprises as remedy for past discrimination in the award of state contracts).

8. *United States v. City of Panama*, 661 F.2d 562 (6th Cir. 1981) (City of Parma, by rejecting all public and low-income housing, was maintained as a racially segregated community), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1972, 72 L.Ed.2d 441 (1982).

9. *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) (Court found that City of Toledo had not made progress in complying with consent decree entered into to redress past discrimination in em-

ployment of blacks and Hispanics in the fire department, and therefore modified consent decree to proscribe layoffs on basis of seniority).

10. *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979) (Cleveland Board of Education intentionally operated a school system which was unconstitutionally segregated on the basis of race), *cert. denied*, 445 U.S. 935, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980), *appeal after remand*, 662 F.2d 1219 (6th Cir. 1981) (Ohio State Board of Education and Ohio Superintendent of Public Instruction intentionally supported the unconstitutional segregation of the Cleveland City School District), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982).

11. *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914 (6th Cir. 1979) (approving consent decree entered into to remedy racial imbalance in City of Toledo's police department).

12. *Afro American Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (City of Toledo police department racially discriminated in its hiring and promotion practices).

13. *Clemons v. Board of Educ. of Hillsboro*, 228 F.2d 853 (6th Cir.) (Hillsboro Board of Education intentionally maintained racially segregated elementary school system by establishing a racially gerrymandered zoning system), *cert. denied*, 350 U.S. 1006, 76 S. Ct. 651, 100 L.Ed. 868 (1956).

14. *Police Officers for Equal Rights v. City of Columbus*, 644 F. Supp. 393 (S.D. Ohio 1985) (City of Columbus racially discriminated in promotions, transfers, and assignments for members of its police department).

15. *Smith v. Columbus Metro. Hous. Auth.*, 443 F.Supp. 61 (S.D. Ohio 1977) (Columbus Metropolitan Housing Authority unlawfully demoted a black employee when she refused to assist it in its defense of a charge of unlawful racial discrimination).

16. *Dozier v. Chupka*, 395 F.Supp. 836 (S.D. Ohio 1975) (City of Columbus used racially discriminatory employment practices in hiring members of fire department).

17. *Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972) (City of Cleveland used racially discriminatory tests for hiring and promotion within police department).

18. *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972) (City of Cleveland discriminated on basis of race by revoking and refusing to issue building permits for public housing in white areas of city; Cuyahoga Metropolitan Housing Authority discriminated on the basis of race by failing to integrate public housing), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

19. *Etheridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967) (State of Ohio was a joint participant with private contractors in denying Afro-Americans employment on public works projects).

20. *Vann v. Toledo Metro. Hous. Auth.*, 113 F. Supp. 210 (N.D. Ohio 1953) (in action alleging racial discrimination in public housing, the court allowed four months for the Toledo Metropolitan Housing Authority to implement its new non-segregation policy).

21. *Headen v. City of Cleveland*, No. C73-330 (N.D. Ohio April 25, 1975) (City of Cleveland un-

lawfully discriminated against minorities in hiring practices for fire department).

22. *Allison v. City of Akron*, 45 Ohio App. 2d 227, 343 N.E. 2d 128 (Summit App. 1974) (City of Akron discriminated on basis of race by passing ordinance prohibiting the display of real estate "for sale" signs only in certain sections of the city).

23. *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E. 2d 82 (Trumbull App. 1948) (City of Warren racially discriminated in the use of its municipal swimming pool).

24. *Alexander v. Bd. of Election*, 675 F.2d 787 (6th Cir., 1982) (School system desegregation).

25. *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983) (Fire department discrimination).

115. In *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991), the Governor, Secretary of State, and Members of the Hamilton County Board of Elections conceded that the at-large election of Hamilton County Municipal Court Judges unlawfully diluted minority voting strength under Section 2 of the Voting Rights Act.

116. Mr. Mattison testified that BEDO conducted an analysis of totality of circumstances factors. Regrading the history of official discrimination, Mr. Mattison testified:

> We came to the conclusion that there should be a construction of districts in order to minimize what has been a history of exclusion throughout the United States of African-American votes in the electoral process.
>
> (Defendants' Ex. 82, TR. 21)

117. Mr. Mattison concluded that there was, in Ohio, a history of unresponsiveness of government to the interests of the black community.

> A. Well, I guess I am talking not so much about partisan politics as I am government as a nonpartisan administrative entity.
>
> Q. And you see that as unresponsiveness to the interests of the black community?
>
> A. Absolutely.
>
> Q. And that is not something that just occurred today, that's been ongoing.
>
> A. It's an ongoing issue.
>
> Q. And that history you are talking about is a history not just in Cuyahoga County, but Franklin, Hamilton, Montgomery, Summit, all the major areas of Ohio?
>
> A. Absolutely.

(Defendants' Ex. 82, TR. 31-32)

118. Mr. Mattison testified that the effects of discrimination have resulted in black voter apathy in Cuyahoga County. He testified:

> Q. And then in Cuyahoga County, in the Cleveland area in the BEDO plan, your final percentages of black voting population in the majority minority districts were, ranged from 60 percent to 67 percent, or thereabouts?
>
> A. I don't really recall the specific number.
>
> Q. Okay. And why didn't you go to black voting or black population in those districts of 50 percent or 51 percent, or in the lower—
>
> A. Well, as I said, voter participation and voter behavior in Cleveland frankly has been pretty bad as it relates to African American voters. So while I think there are a number of factors, economic status has to do with that, inability of individuals to see a reason for voting in a situation where they

don't feel that their interests are being represented, all of those kinds of things I think add to voter apathy and exacerbate the situation in the African American community.

So our view again was a total view. We came up with the percentages we did based on voter behavior.

Q. Okay. But you went to a higher percentage than just 50.1 percent.

A. Well, we started at 50.1 and then we moved.

Q. You moved up because of the circumstances you described.

A. (Witness nods head.)

Q. And that is reasonable in your position.

A. Absolutely.

Q. Okay. And that is because of the factors of low voter turnout and other things you just described.

A. Absolutely.

Q. And the court needs to understand that when they look at the districts in Cuyahoga County; do they not?

A. Absolutely.

(Defendants' Ex. 82, TR. 52, 53)

119. Mr. Mattison also testified that there is governmental discrimination based on governmental apathy in Ohio to the interests of the black community. (Defendants' Ex. 82, TR. 31).

120. School systems operate under desegregation orders in major urban areas in Ohio. (Defendants' Ex. 66). As indicated by Mr. Tilling's participation on the Joint Select Committee on School Desegregation in the General Assembly (unanimously supported by Republicans), the effects of school desegregation in education in Ohio persist. (Defendants' Ex. 96, TR. 96, 97). (See also Deposition of Dana Mattison, Defendants' Ex. 82, TR. 57; Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 34).

121. Floyd Johnson testified concerning discrimination orders in Montgomery County, Ohio. He testified:

> Q. Now to the extent again you have personal knowledge in the Montgomery County area, is the school system still subject to a desegregation order?
>
> A. Court ordered.
>
> Q. Do you know of any other discrimination orders existing in Montgomery County in the public sector, for example the fire department, police department, or anything like that?
>
> A. They just settled yesterday a police discrimination suit in hiring for the Dayton police and fire departments that Representative McLin was intimately involved in and efforts have been made to recruit minorities for the police force. And that's the FOP, which is the police, quote-unquote white police union, and the judge made a ruling yesterday that the City of Dayton did not overtly discourage minorities from applying.
>
> However, over the course of twelve years the City of Dayton had made substantial appeals to hiring minority through the fire and police departments, so the judge made the ruling as a result of the NAACP's effort and Southern Christian Leadership and the various ministers associations' efforts to get blacks employed in the police department, so although it wasn't a court order, that has been in the courts.
>
> Q. And you say that has been settled?
>
> A. Yesterday there was a ruling by Judge Rice.
>
> Q. And what is the effect of that settlement then?
>
> * * * *
>
> A. There was in effect in the City of Dayton an ordinance to set aside certain contracts for minority contractors because of past discrimination against minorities who wanted to do business in the trades, and it was set aside, suspended, January 30th of 1989.

A study was conducted by and paid for by the Dayton City Commission that documented racial discrimination in award of contracts, and recommendations have been made to the City Commission to attempt to reinstate that program within the framework of the Supreme Court ruling. It's not a court order but it is, the program is on suspension because of a Supreme Court ruling. And the discrimination is still there.

(Defendants' Ex. 97, TR. 34-36)

122. Virtually all public witnesses in the public hearings urged the persons responsible for apportionment to maintain and enhance majority-minority and influence districts throughout the state. These witnesses included:

1. Peter Silverman, Toledo City Council (October 8, 1991, TR. 74).
2. Fred Parker, Columbus Branch, NAACP (August 29, 1991, TR. 25, 26);
3. William Nelson, Professor of Black Studies, Ohio State University (August 29, 1991, TR. 25-26).
4. Thaddeus Jackson, Chairman Cuyahoga County Board of Elections, Vice-Chairman, 21st Congressional District Caucus (August 28, 1991, TR. 21).
5. James Mitchell, Black Elected Suburban Officials (August 28, 1991, TR. 24);
6. Dr. Gordon Wetz—Wright State University August 29, 1991, TR. 20)
7. Reverend Richard L. Righter, Pastor, Congregation of Reconciliation (August 29, 1991, TR. 31);
8. Ray Segritz—Councilman—City of West Carrollton (August 29, 1991, TR. 44);

9. Frank Allison, Cincinnati Branch, NAACP (September 7, 1991, TR. 36);

10. Jerry Hammond, former President of Columbus City Council (September 7, 1991, TR. 48-49);

11. Samuel Graham, Columbus Urban League (September 7, 1991, TR. 61);

12. Mark Bradley, People's Coalition For Voter Participation (September 7, 1991, TR. 61);

13. Wayne West, Young Black Democrats (September 7, 1991, TR. 67);

14. Cathy Mock, President, Young Black Democrats (September 7, 1991, TR. 109);

15. Robert Deitchman, President of Equal Access Education Association (September 12, 1991, TR. 16).

123. Both the NAACP and the BEDO have taken the position that the persons responsible for apportionment must create majority-minority districts wherever possible and must maintain and enhance existing minority districts. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 47; Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 42-50).

a. *Racial Bloc Voting*

124. There exists clear evidence of racial bloc voting throughout the State of Ohio. Dr. King analyzed over 200 elections from 1982 through 1990. Dr. King conducted a bivariate ecological regression analyses and determined that all the data indicated significant racially polarized voting. (Defendants' Ex. 95, TR. 40). Defendants' Exhibits 92 and 93 indicate the results of Dr. King's analysis. Dr. King verified the results of his bivariate ecological regression analysis by conducting a homogeneous present analysis and an analysis based on an aggregated compound multinomial model. These

analyses confirmed the results of the bivariate ecological regression analysis. (Defendants' Ex. 95, TR. 44). See also Transcript of Board Hearing, February 11, 1992, TR. 46-55.

125. Gordon Henderson presented no support of his regression analysis and no standard deviations to verify the degree of certainty of his analysis which only reviewed eleven house districts currently served by minority incumbents. Mr. Henderson also only reviewed those races for one year. On that basis, Mr. Henderson's analysis is not credible.

c. *Racial Barriers To Effective Participation*

126. Minorities have experienced racial barriers to effective participation in the democratic process in Ohio.

127. As Executive Director of BEDO and as an active participant in Ohio Democratic politics, Dana Mattison is knowledgeable concerning Ohio Democratic primaries and screening processes. Mr. Mattison testified that there is no consistent system of open primaries in the Democratic party. Local "screenings" of candidates occur both on a county level. "Unofficial processes" occur where various organizations may provide endorsements. (Defendants' Ex. 82. TR. 26, 27).

128. Minorities receive no significant financial support from the Ohio Democratic Party. Mr. Mattison testified:

> Q. And is there financing available from the State Democratic Party?
>
> A. I have not known that to be a big force of financial support. The answer to that in the main is no.
>
> (Defendants' Ex. 82, TR. 28)

129. Mr. Mattison testified that there have been barriers to recruitment of black candidates for state legislative offices. He testified:

Q. Again because we're talking about state legislative apportionment now for the moment, with regard to state representative offices and state senator offices, have there been some barriers in order to recruit black candidates for those offices?

A. Absolutely.

(Defendants' Ex. 82, TR. 28)

130. These barriers include racial bloc voting, campaign financing, "electibility" of blacks and governmental apathy. (Defendants' Ex. 82, TR. 28, 29).

131. "Electibility" of blacks prevents a barrier to effective participation of blacks in primaries. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 29). Mr. Mattison testified:

Q. You also talked about electibility as being a problem, as a barrier, racial barrier. What do you mean by that?

A. Electibility, based on a very clear—and again this probably more gut than statistical, although I think the statistics would bear it out—that African Americans, people will vote for African-Americans simply based on the fact that they are African Americans, and that our perception has been that translates into, "I don't care how good you are, I don't care how much you know about your subject matter, and how astute you are". It goes to the issue of racial bloc voting, is really what I am talking about.

(Defendants' Ex. 82, TR. 32, 33)

132. Race plays a role in Ohio elections. Mr. Mattison testified:

Q. Have there been elections that you are aware of in the major urban areas of Ohio where African Americans were not elected simply because of their race?

A. Yes.

Q. Okay. Could you give us some examples or elaborate on that?

A. Sure, I think the best example is the Mallory case out of Cincinnati. From a statistical standpoint it's very clear what has happened down there. Irrespective of party, individuals will vote for white candidates, irrespective of who is most qualified, irrespective of whether the person runs as a Democrat, as a Republican. There clearly is racial bloc voting in that area.

(Defendants' Ex. 82, TR. 33, 34)

133. Mr. Mattison further testified:

Q. Have you seen barriers to black candidates, successful black candidates in Cincinnati, because of the at-large system in Cincinnati?

A. Absolutely, judicial as well. That is the crux of the Mallory case.

Q. Where is the Mallory case now, where is that?

A. The decision has been rendered, and again this is a result of a recent Supreme Court decision, that said judicial races are in fact subject to the Voting Rights Act. But the decision has been rendered. The question now is the remedy that is being discussed and negotiated.

(Defendants' Ex. 82; TR. 63)

134. Blacks have not been fully supported by the Ohio Democratic Party. Mr. Mattison testified:

Q. Are you totally satisfied, Mr. Mattison, that black candidates have been fully supported by Democratic, by the Democratic Party in Ohio?

A. I think to the extent—well, let me just say no, I don't think that they have been supported as much as they should have been. But I think it's indicative of more than just a partisan issue. I

don't think any black pursuing political office has been supported in this system as they should have been.

(Defendants' Ex. 82, TR. 64)

135. Campaign financing and party endorsement pose effective racial barriers to black participation in the Democratic primary system. (Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 23, 24). Mr. Johnson testified:

Q. Have you in your experience recognized that it is difficult for black candidates to raise campaign financing?

A. Absolutely.

Q. And why is it difficult?

* * * *

A. In the early days we didn't have access to and relationships with groups and individuals who had an interest in supporting minority candidates.

And after the incumbency they did, so an incumbent could raise money if he was doing, he or she was doing their job, as well as a white candidate could—not at the same level, but they could. But a new candidate just coming out would have very difficult opportunities for raising capital.

Q. Would that still be the situation day?

A. Absolutely.

(Defendants' Ex. 97, TR. 28).

136. Mr. Johnson testified that the Democratic Party screening process creates racial barriers to black candidates in Ohio. He testified:

Q. Okay. In the Democratic party, to the extent you have personal knowledge, how does one become a candidate as a Democrat in the primary?

A. Well, in Montgomery County you submit your name to a screening committee, which is appointed

by the chairman, and then the screening committee would make a recommendation to the executive committee and the executive committee makes a recommendation to the central committee. And the central committee votes. Some were cut and dry, but that is a quote-unquote Democratic process.

Q. You say it may be cut and dry on occasion. What did you mean?

A. It may be cut and dried since the individuals on the executive committee normally are employees of some elected officials and those persons on the central committee are usually the employees of some office.

Q. Does that structure create any barriers for black candidates?

A. If a candidate is an independent thinker it creates substantial barrier.

(Defendants' Ex. 97, TR. 33, 34).

See also Transcript of Board Hearing, February 11, 1992, TR. 66.

137. In 1981, the Democrats effectively precluded minority Senator Morris Jackson's participation in drawing district lines. (Defendants' Ex. 96, TR. 98). In the early 1980's, Democrats foreclosed Senator Jackson's participation as a delegate to the Democratic National Convention. (Defendants Ex. 96, TR. 98).

e. *Effects of Discrimination*

138. Minorities in Ohio bear the effects of discrimination in education, employment, and health which hinder their ability to participate effectively in the political process. See Defendants' Ex. 106, *Ohio's African-American Males: A Call To Action*, Report of Governors' Commission on Socially Disadvantaged Black Males and Defendants' Ex. 107, *Final Report, Governors Task Force*

of Black and Minority Health; Testimony of Johnson, Transcript of Board meeting of February 11, 1992, TR. 67.

139. Blacks experience a significantly higher unemployment rate in Ohio and significantly less opportunity for professional employment. This occurs throughout the state and every major urban area in Ohio. Specifically, in 1990, the unemployment rate for white males was 4.6% but 16.6% for black males. Total unemployment for whites was 4.6% but 14.2% for blacks. Unemployment for whites, ages 16 to 19, was 11.6% but 40.4% for blacks, ages 16 to 19. The unemployment rate for blacks was 13.6% in Cincinnati, 17.3% in Cleveland, 6.8% in Columbus and 10.6% in Dayton—all significantly higher than whites. Similar statistics apply in 1988 and 1989. (Defendants' Exs. 64, 65 and 66; Defendants' Ex. 96, TR. 97). (See also Deposition of Floyd Johnson, Defendants' Ex. 97, Tr. 36).

140. Defendants' Exhibit 101 is a summary of unemployment rates by race for 1979 through 1990 in the major urban areas of Ohio based on published statistics of the Bureau of Labor Statistics. The summary reflects a disparity in employment by race.

SUMMARY OF UNEMPLOYMENT RATES BY RACE
(annual averages)*

	Cincinnati SMSA		Cleveland SMSA		Columbus SMSA		Dayton/Springfield SMSA	
	White	Black	White	Black	White	Black	White	Black
1979	5.6%	12.7%	4.4%	12.6%	NA	NA	NA	NA
1980	6.9%	20.5%	6.7%	19.0%	NA	NA	NA	NA
1981	9.0%	22.4%	8.0%	20.8%	NA	NA	NA	NA
1982	12.4%	NA	8.5%	23.8%	NA	NA	NA	NA
1983	11.3%	26.0%	9.6%	18.8%	NA	NA	NA	NA
1984	7.8%	24.8%	7.2%	18.8%	NA	NA	NA	NA
1985	7.8%	15.8%	6.7%	21.5%	NA	NA	NA	NA
1986	6.2%	16.6%	5.6%	20.3%	4.9%	11.4%	5.7%	11.6%
1987	4.4%	14.9%	5.8%	14.8%	4.1%	11.0%	4.3%	10.6%
1988	4.5%	13.5%	5.3%	14.2%	4.3%	10.3%	3.7%	10.4%
1989	3.2%	13.6%	3.6%	17.3%	4.4%	6.8%	4.1%	10.6%
1990	3.7%	13.7%	3.4%	15.1%	3.5%	11.7%	4.9%	15.1%

* Taken from *Geographic Profile of Employment and Unemployment, 1979* through *Geographic Profile of Employment and Unemployment, 1990*, published by the United States Department of Labor, Bureau of Labor Statistics.

141. Defendants' Exhibit 102 reflects mean household income based on 1980 census data in the eight major urban counties of Ohio. The exhibit reflects discrepancy in mean household income by race.

MEAN HOUSEHOLD INCOME (1979)
(from 1980 census) *

	White	Black
Cuyahoga County	$23,130	$15,070
Franklin County	21,138	14,416
Hamilton County	22,770	13,825
Lucas County	21,540	14,315
Mahoning County	20,259	14,118
Montgomery County	21,463	14,823
Summit County	21,811	14,481
Stark County	20,846	15,239

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

142. Defendants' Exhibit 103 reflects the percentage of families living below the poverty level based on 1980 census data for the eight major urban counties of Ohio. The exhibit reflects discrepancy in the number of families living below the poverty level by race:

FAMILIES LIVING BELOW POVERTY LEVEL
(from 1980 census) *

	White	Black
Cuyahoga County	4.7%	24.4%
Franklin County	6.3	23.1
Hamilton County	5.0	25.4
Lucas County	6.1	27.2
Mahoning County	5.8	27.3
Montgomery County	6.0	23.8
Summit County	5.2	24.5
Stark County	5.4	24.4

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

143. Defendants' Exhibit 104 reflects education levels for the eight major urban counties in Ohio by race based on 1980 census data. The exhibit reflects a discrepancy in education by race.

EDUCATION
(from 1980 census)*

	% Who Have Not Completed High School (Age 25 and Older)		% Who Have Completed One or More Years of College (Age 25 and Older)	
	White	Black	White	Black
Cuyahoga County	30.5%	44.0%	31.8%	13.8%
Franklin County	25.1	40.2	38.7	24.5
Hamilton County	31.9	50.9	34.9	20.1
Lucas County	31.0	48.0	30.0	21.0
Mahoning County	32.4	48.6	24.8	16.1
Montgomery County	29.2	39.1	32.0	25.5
Summit County	29.3	46.8	30.7	19.5
Stark County	31.5	50.7	23.0	13.9

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

144. Defendants' Exhibit 105 reflects the value of housing, based on 1980 and 1990 census data, by race for the eight major urban counties in Ohio. This exhibit reflects a discrepancy in the value of housing by race.

VALUE OF HOUSING *

	1980 Census (median)		1990 Census (mean)	
	White	Black	White	Black
Cuyahoga County	$54,500	$27,900	$94,051	$51,805
Franklin County	49,000	31,500	93,303	57,580
Hamilton County	50,200	36,900	98,205	60,826
Lucas County	43,400	24,700	72,180	41,073
Mahoning County	39,700	20,200	58,757	29,675
Montgomery County	44,100	25,900	81,259	29,104
Summit County	46,500	24,600	78,424	44,295
Stark County	45,200	23,100	65,582	38,785

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

145. Dana Mattison attributed the discrepancy in income and employment in Ohio to racial discrimination. He testified:

> Q. What do you attribute those factors to, the discrepancy between black and white in terms of income and unemployment in the State of Ohio?
>
> A. In a word, racism.
>
> Q. Racism throughout the major urban areas?
>
> A. Discrimination in employment—I mean there are a whole plethora of reasons, misperception of employers about black employees, inability of employers to provide equal compensation, all of those things, I think—and quite frankly, the status of the economy right now. We have gotten to a point I think in the economy where decisions have to be made about who is going to work and who is not. And unfortunately last hired, first fired.
>
> (Defendants' Ex. 82, TR. 62)

146. Minority voter turnout in Cleveland is extremely low due to minority frustration and apathy. (Desposition of Dana Mattison. Defendants' Ex. 82, TR. 52).

147. The geographical displays of minority population concentrations indicate past discrimination in housing. (Defendants' Exs. 26, 30, 34, 38, 42, 46 and 50).

148. Blacks are less mobile and less able to obtain housing due to past housing discrimination practices. (Desposition of Dana Mattison, Defendants' Ex. 82, TR. 37).

f. *Overt or Subtle Racial Appeals*

149. Political campaigns in Ohio have been characterized by overt or subtle racial appeal.

150. Mr. Mattison testified that he has observed overt or subtle racial appeals in Ohio political campaigns. He testified:

Q. Fair enough. We talked a little bit about political campaigns before. Have you seen racial appeals in political campaigns in Ohio?

A. I would say yes, probably more by ommission than commission.

Q. Have you seen in races in Ohio the deliberate portrayal of pictures of the candidates either on t.v. or media?

* * * *

A. You said by picture?

Q. Yeah, in the media, in the newspapers, you know, where the race is made predominant because of the picture.

A. I am aware of situations where that has happened.

Q. Any other situations like that in state legislative races where race has become an issue because of the campaign itself or in the campaign itself?

A. I think race is automatically made an issue of if one of the candidates is black.

(Defendants' Ex. 82, TR. 64-66)

151. Mr. Johnson, who is also experienced in state politics, has both observed and experienced subtle or overt racial appeals in political campaigns. He testified:

Q. Let me ask you this question. In, regarding the NAACP and your experience with the NAACP and the Ohio Conference of Branches, have you had occasion—strike that.

Let me start the question over again. You had indicated your experience in the voting rights area and civil rights area and the political area. Have you observed in that experience overt or subtle racial appeal in political campaigns?

A. Yes, absolutely.

Q. All right. Would you relate your experiences?

A. My experiences have been that whenever you have candidates of a particular racial or ethnic

group running for office you have got a higher voter turnout, you get a higher voter registration, and in fact one of the exhibits that I didn't share was that, that went into our analysis, was a campaign in Dayton for city commission by candidate Dean Lovelace, in which he won—we had 22 wards. He won ten wards solidly against the endorsed Democrat, and lost the race as a result of strong effort by the party to run its candidate and not take recommendations from the minority community. And that was probably the most polarized race of my 25 year experience. And that information is contained in this report.

(Defendants' Ex. 97, TR. 24, 25)

152. Mr. Johnson testified that race was a factor in his campaign for a house seat in Montgomery County in 1980 against a white Democrat. Mr. Johnson testified:

Q. You had mentioned a campaign that you were involved in, a campaign against a Mr. Ed Orlett.

A. That is correct.

Q. That was in—

A. 1980.

Q. Mr. Orlett was a white candidate?

A. He was a white Democratic candidate who had represented the other influence district in Montgomery County.

Q. And was he a Democrat?

A. He was a Democrat.

Q. Did you run against him as an independent in the primary?

A. As a Democrat in the primary.

Q. Do you believe that there was racial polarized voting in that primary election?

* * * *

A. There was 33 percent black population in that district. I received 33 percent of the vote.

Q. You received 33 percent of the vote?
A. (Witness nods head.)
Q. Mr. Orlett 67 percent?
A. 67, approximately.

(Defendants' Ex. 97, TR. 30, 31)

153. There is a recognition in state Democratic politics that people do not vote for blacks solely because of their race. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 32);

154. There exists racial appeals in political campaigns as evidenced by prominent pictures of black candidates to reinforce the perception that the candidate is black. (Deposition of Dana Mattison. Defendants' Ex. 82. TR. 65; Testimony of Floyd Johnson, Transcript of Board Hearing, February 11, 1992; TR. 66).

155. Opponents in campaigns raise the issue of "welfare" whenever a black candidate runs for office. (Deposition of Dana Mattison. Defendants' Ex. 82, TR. 65).

156. Racial appeals exist in local races in Montgomery County. Higher voter turnout occurs when a black candidate runs for office. (Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 23);

157. Race plays a key role in politics in Central Ohio. Former President of City Council Jerry Hammond cited the Frances-Lashutka race for Columbus' City Attorney and the Moody-Rosemond races for Mayor. (Testimony of Jerry Hammond, September 7, 1991, TR. 48-49);

158. James Tilling, based on his experience in the Senate campaigns, testified that subtle or overt racial appeals have been made in numerous elections, citing the Forbes-Bonono race in Cuyahoga County, the C.J. Thomas-Ike Thompson race, Virgil Browns' race for Secretary of State. Carl Stokes' race for mayor in Cleveland, the Lashutka-Francis race for Columbus City Attorney, the Moody-Francis race for Columbus Mayor and the Lashutka-Espy race for Columbus Mayor. (Deposition of James Tilling, November 20, 1991, TR. 195-198).

g. *Extent to Which Minorities Have Been Elected To Public Office - Population, Demographics and Incumbency Factors*

159. No minority candidate has ever been elected to statewide office in Ohio. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 41).

160. Defendants' Exhibits 115 is a listing of political races with results where a minority ran against a white for office. This exhibit indicates the following:

SUPREME COURT JUSTICE—GENERAL 1990

Stephanie Tubbs Jones (D)	1,255,556
Craig Wright (R)	1,319,422

SECRETARY OF STATE—PRIMARY 1982

Sherrod Brown (D)	304,952
Anthony O. Calabrese (D)	214,901
Dennis J. Kucinich (D)	246,618
Virgil E. Brown (R)	538,801

GENERAL 1982

Sherrod Brown (D)	1,739,602
Virgil E. Brown (R)	1,362,079
Margaret Ann Leech (LIB)	143,943

SUPREME COURT JUSTICE—PRIMARY 1980

Sara J. Harper (R)	552,776
Frank D. Celebrezze (D)	844,306

GENERAL 1980

Sara J. Harper (R)	1,369,973
Frank D. Celebrezze (D)	2,203,172

PRIMARY 1972

Lloyd O. Brown (D)	606,628
Paul Brown (R)	524,488
George C. Farris (R)	110,816

GENERAL 1972

Lloyd O. Brown (D)	996,674
Paul Brown (R)	1,957,760

161. With the exception of Cuyahoga County, minorities have had little success in elections to local offices. The Affidavit of William Pfeiffer (Pfeiffer Ex. 1) indicates the following:

OHIO BLACK OFFICIALS

	County Commissioners	City Council	Municipal Judges	Common Pleas Judges
Akron (Summit)				
1984	1	2	1	0
1985	0	2	1	0
1986	0	2	2	0
1987	0	2	2	0
1988	0	3	2	0
1989	0	2	2	0
(Cincinnati (Hamilton)				
1984	0	2	2	0
1985	0	2	2	0
1986	0	1	1	0
1987	0	1	1	0
1988	0	4	1	1
1989	0	1	1	1
Columbus (Franklin)				
1984	0	2	2	0
1985	0	2	2	0
1986	0	2	2	0
1987	0	2	3	0
1988	0	2	3	0
1989	0	2	3	0
Dayton (Montgomery)				
1984	0	3	3	1
1985	0	3	3	1
1986	0	4	3	1
1987	0	3	3	1
1988	0	3	2	1
1989	0	3	2	1

	County Commissioners	City Council	Municipal Judges	Common Pleas Judges
Toledo (Lucas)				
1984	0	1	1	1
1985	0	1	0	2
1986	0	0	1	1
1987	0	0	1	1
1988	0	0	1	1
1989	0	0	2	0

162. There are currently eleven (11) minority state representatives in Ohio. The majority of these minority incumbents have served for multiple terms. The minority representatives are, by and large, long term incumbents or enjoy family name recognition. The incumbents and their terms are as follows:

MINORITY STATE REPRESENTATIVES

Troy Lee James	13 terms
C.J. Prentiss	1st term
Vermel Whalen	4 terms
William Mallory	13 terms
Helen Rankin	8 terms
Ray Miller	6 terms
Otto Beatty, Jr.	7 terms
Rhine McLin	2 terms
Tom Roberts	4 terms
Vernon Sykes	5 terms
Casey Jones	12 terms

(Affidavit of William Pfeiffer Ex. 1)

163. As indicated above, most of the 1981 established minority districts fail to meet the population requirements of Article XI, Section 3. These districts include:

CUYAHOGA COUNTY

H.D. 12 - James
H.D. 14 - Prentiss
H.D. 16 - Whalen

HAMILTON COUNTY
H.D. 23 - Mallory
H.D. 25 - Rankin

FRANKLIN COUNTY
H.D. 31 - Beatty

MONTGOMERY COUNTY
H.D. 36 - McLin

164. Defendants' Exhibit 57 is a report of 1981 House Districts with 1990 population showing the deviation of all house districts from the population requirements of Article XI, Section 3 and percentage of Black Voting Age population for the minority districts. This exhibit indicates the population deviation in minority districts.

1981 APPORTIONMENT HOUSE DISTRICTS
WITH 1990 POPULATION

District	Population	Deviation	Percent Black	Percent Black VAP
12	84098	−25469	75.25	71.63
14	91972	−17595	90.39	88.45
16	96258	−13309	94.92	94.23
23	97630	−11937	46.07	39.78
25	99765	−9802	53.34	49.58
29	106537	−3030	38.73	35.00
31	97764	−11803	46.98	42.49
36	115907	6340	42.20	39.75
37	108769	−798	36.29	32.76
42	105536	−4031	35.53	32.01
45	107825	−1742	41.95	37.61

165. Accordingly, most of the districts currently represented by minority incumbents must be reconfigured to must the population requirements of Article XI, Section 3 of the Ohio Constitution.

166. Black voter turnout in minority districts varies by district. Black voter turnout in Cuyahoga County House Districts 12 and 14 is lower than that in other districts. Black voter turnout in H.D. 23 (Mallory) is significantly lower than in any other minority district. Henderson Exhibit 3 indicates the following black voter turnout in the 1990 elections for state representative seats in the districts presently served by a minority candidate.

H.D. 12 (James)	—	25.87%
H.D. 14 (Prentiss)	—	28.33%
H.D. 16 (Whalen)	—	34.30%
H.D. 23 (Mallory)	—	12.63%
H.D. 25 (Rankin)	—	36.10%
H.D. 29 (Miller)	—	34.36%
H.D. 31 (Beatty)	—	31.30%
H.D. 36 (McLin)	—	36.33%
H.D. 37 (Roberts)	—	30.05%
H.D. 42 (Sykes)	—	31.38%
H.D. 45 (Jones)	—	29.53%

167. There exists significant racial bloc voting not only throughout the State of Ohio but also in minority districts. Defendants' Exhibit 108 is a compilation of the results of Dr. King's bivariate ecological regression analysis for minority districts. Every district reflects significant racial bloc voting. The data analyzed again includes both House and Senate districts, statewide and national races. (Transcript of Board Meeting, February 11, 1992, Tr. 46-48).

Defendants' Exhibit 109 reflects the average proportionate vote by race for black incumbent House candidates for the years 1984 through 1990. This exhibit indicates the following:

Ecological Regression Analysis

Average Proportion Voting for Black Incumbent State House Candidates Among:

	Whites [1]	(S.E.)[2]	Blacks [3]	(S.E.)[2]
1984	0.5676	(.0023)	0.9519	(.0023)
1986	0.6022	(.0018)	0.9548	(.0020)
1988	0.6788	(.0027)	0.9846	(.0032)
1990	0.6153	(.0017)	0.9569	(.0020)

[1] An estimate of the proportion of white citizens in districts with a black incumbents who vote for that incumbent.

[2] The standard error, a measure of uncertainty of the corresponding estimate.

[3] An estimate of the proportion of non-hispanic black citizens in districts with a black incumbent who vote for that incumbent.

168. While there is a white crossover voting in the minority districts, except in districts in Cuyahoga County where the current black population in House Districts 12, 14 and 16 exceeds 70%, there is insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district. The following is a comparison of data showing total population, Black VAP, total candidate vote, vote from black and white precincts and voter turnout for the minority incumbent districts other than Cuyahoga County. The data is derived from Henderson Exhibit 3, reflecting 1990 election results, and Defendants' Exhibit 57.

District	Total Population	Black VAP	Total Candidate Vote	From Black Precincts	From White Precincts	Voter Turnout
H.D. 23 (Mallory)	97,630	39.78%	14,190	94.20%	57.23%	28.23% White 12.63% Black
H.D. 25 (Rankin)	99,765	49.58%	21,556	94.55%	50.93%	41.02% White 36.10% Black
H.D. 29 (Miller)	106,537	35.0%	15,683	94.24%	51.0%	28.16% White 34.36% Black
H.D. 31 (Beatty)	97,765	42.49%	16,635	95.46%	53.08%	33.05% White 31.30% Black
H.D. 36 (McLin)	115,907	39.75%	18,129	97.69%	36.57%	31.13% White 36.33% Black
H.D. 37 (Roberts)	108,769	32.76%	15,406	94.55%	47.70%	29.26% White 30.05% Black
H.D. 42 (Sykes)	105,536	32.01%	19,238	95.69%	48.79%	40.22% White 31.38% Black
H.D. 45 (Jones)	107,825	37.61%	15,536	92.78%	45.41%	26.60% White 29.53% Black

169. Further, since House Districts 23, 25, 31 and 36 must be reconfigured to meet the population requirements of Article XI, Section 3, and since no election has occurred in such newly reconfigured districts, there is no election data existing to indicate a minimum percentage of black population to ensure the election of black candidates in such districts.

170. Dr. King testified that Mr. Tilling, in preparing the 1991 Apportionment Plan, eliminated packing in the 1981 plan and took fragmented minority votes spread throughout the state and joined them together in order to empower minorities electorally in compliance with the Voting Rights Act. The 1991 Apportionment Plan creates eight (8) minority-majority districts, twice the number in the 1981. (Transcript of Board Hearing, February 11, 1992. TR. 51). Defendants' Exhibit 110 provides:

Rank	Current District	Black Population	Tilling District	Black Population
1	16	0.9467	12	0.6496
2	14	0.9005	10	0.6309
3	12	0.7480	8	0.6119
4	25	0.5320	9	0.5812
5	31	0.4680	30	0.5669
6	23	0.4590	31	0.5243
7	36	0.4210	38	0.5055
8	45	0.4170	21	0.5010
9	29	0.3850	49	0.4737
10	37	0.3610	22	0.4407
11	42	0.3540	11	0.4043
12	15	0.3480	44	0.3932
13	24	0.3230	64	0.3091
14	53	0.2780	39	0.2913
15	32	0.2660	32	0.2150
16	17	0.2614	61	0.1352
17	50	0.1490	54	0.1286
18	18	0.1470	73	0.1071
19	19	0.1440	66	0.1028
20	47	0.1320	1	0.1001

Rank	Current District	Black Population	Tilling District	Black Population
21	59	0.1281	79	0.0840
22	22	0.1260	76	0.0811
23	30	0.1240	26	0.0799
24	27	0.1220	25	0.0791
25	62	0.1164	35	0.0789
26	1	0.1115	23	0.0773
27	52	0.1050	33	0.0748
28	55	0.0990	14	0.0683
29	69	0.0970	45	0.0538
30	64	0.0955	53	0.0521

NOTE: "Black population" is the proportion of the voting age population of a district who are non-hispanic blacks. Proportions underlined are "majority-minority" districts (i.e., greater than fifty percent black).

171. Dr. King analyzed the effect of incumbency in elections in the minority districts for 1984, 1986, 1988 and 1990. Dr. King performed a regression analysis. The standard deviations supporting the accuracy of the regression analysis are presented in Defendants' Exhibit 111. (Transcript of Board Hearing, February 11, 1992; TR. 52).

172. Dr. King testified that it is unreasonable to configure minority districts based on incumbency since the historical election results vary by election, the incumbency advantage shifts with election results each election, and because incumbents may not run in future elections because of retirement, changes in political office, death or any number of other factors. (Transcript of Board Hearing, February 11, 1992, TR. 53-55).

173. Defendants' Exhibit 112 is a regression analysis of the effect of incumbency in elections in the minority districts for 1984, 1986, 1988 and 1990. First, Defendants' Ex. 112 indicates that election results in every minority district for the years analyzed reflect an incumbency advantage on the order of six to ten percent (6-10%). Second, the incumbency advantage in each dis-

trict varies significantly by election. Finally, the predicted vote in all minority districts in all years analyzed indicates that the 1991 Apportionment Plan does not "pack" minorities in house district. (Transcript of Board Hearing, February 11, 1992; TR. 53-55). Defendants' Exhibit 112 provides:

Predicted Election Results
For Districts with Black Incumbent Legislators

Predictions for 1984

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.8852	0.8519	0.7541
14	8	0.8847	0.8239	0.7260
16	12	1.0000	0.8358	0.7379
23	31	0.7083	0.7512	0.6534
25	30	0.6431	0.7525	0.6546
29	22	0.6311	0.6888	0.5910
31	21	0.6892	0.7441	0.6462
36	38	0.6610	0.8022	0.7044
37	39	0.6875	0.7143	0.6165
42	44	0.6889	0.7973	0.6995
45	49	0.7254	0.8235	0.7257
Average Stan. Err.		(0.0564)	(0.616)	(0.0625)

Predictions for 1986

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.8406	0.7826	0.6768
14	8	1.0000	0.7600	0.6542
16	12	1.0000	0.7897	0.6840
23	31	0.6966	0.6934	0.5876
25	30	0.6840	0.7097	0.6039
29	22	0.6739	0.6955	0.5898
31	21	0.6999	0.7434	0.6377
36	38	0.6739	0.7361	0.6304
37	39	0.6544	0.6798	0.5741
42	44	0.6801	0.7489	0.6432
45	49	0.7277	0.7753	0.6696
Average Stan. Err.		(0.0562)	(0.0628)	(0.0638)

Predictions for 1988

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.8403	0.7742	0.6374
14	8	1.0000	0.7546	0.6178
16	12	1.0000	0.7686	0.6318
23	31	0.6890	0.7119	0.5751
25	30	1.0000	0.7260	0.5892
29	22	0.6939	0.7026	0.5658
31	21	0.7217	0.7366	0.5999
36	38	0.7096	1.0000	0.6040
37	39	0.9909	0.7072	0.5704
42	44	0.6444	0.7623	0.6255
45	49	0.7450	0.7829	0.6461
Average Stan. Err.		(0.0564)	(0.0629)	(0.0641)

Predictions for 1990

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.9071	0.8756	0.8067
14	8	0.8419	0.8377	0.7688
16	12	0.9255	0.8786	0.8098
23	31	0.7214	0.7597	0.6909
25	30	0.7296	0.8326	0.7638
29	22	0.6976	0.7782	0.7094
31	21	0.7413	0.8683	0.7995
36	38	0.7077	0.8640	0.7952
37	39	0.6834	0.7551	0.6863
42	44	0.6512	0.8498	0.7810
45	49	0.7428	0.8866	0.8178
Average Stan. Err.		(0.0586)	(0.0634)	(0.0649)

NOTE: Predictions are estimates of what the Democratic proportion of the two-party vote would be under the specified conditions.

[1] Predictions under the current districts are duplicated (for comparison) from Table 1. To calculate predictions under the Tilling plan, the results of the regression analysis described at the foot of Table 2 were used with the analogous explanatory variables calculated under the Tilling plan.

[2] These columns report district predictions of the Democratic proportion of the two-party vote in a hypothetical situation in which candidates in these elections were non-incumbents and faced an opposition candidate.

174. Accordingly, unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts due to factors such as changes in population, demographics, incumbency factors, campaign funding and contest of seats.

175. Both BEDO and the NAACP have taken the position that it is unreasonable to configure districts based on incumbency. Dana Mattison testified:

> Q. Now, going back to Hamilton County just briefly for a second, same situation, Rankin and Mallory have been representatives elected over a long period of time and yet you increased the percentage of black population.
>
> A. Uh-huh.
>
> Q. Why is that?
>
> A. Again, this is an individual district-by-district examination. We believe that communities that respond behave differently based on a whole range of circumstances. Again, understand that Representative Rankin came to that district after her husband passed away, and there is a long-standing relationship with voters, but that does not mean that the trends indicate that that's going to continue over time, and what we tried not to do was to construct districts based on incumbents. That just was not the reasonable thing to do.
>
> Q. Voting Rights Act does not protect incumbents?
>
> A. That's right.
>
> Q. It protects voters.
>
> A. And opportunity to elect candidate of choice.
>
> Q. And just to wrap things up, same thing for Franklin County, Beatty and Miller are representatives who have been elected for terms yet you increased the black population?
>
> A. See, we did not look at the issue of the individual and how much they had won other than to

try and get a sense of the history of voting patterns and I know that sounds a little antithetical but you've got to have some sense of the history of how voters have behaved in that district.

(Defendants' Ex. 98, TR. 72, 73)

176. Floyd Johnson testified on behalf of the NAACP as follows:

Q. All right. And Representative Miller's district was an influence district that—strike that—was also a majority minority district in terms of black voting age population?

A. Let me respond to that this way. We at the NAACP approached these as simply legislative districts and not necessarily districts for Mr. Beatty. And our objective was to create majority minority legislative districts and influence districts and not draw districts for individual elected officials.

(Defendants' Ex. 97, TR. 41)

177. Finally, Mr. Tilling also adopted the position in configuring districts that districts should not be configured based on incumbency. Mr. Tilling testified:

And we tried, as the Voting Rights Act makes clear, to draw the districts to protect a class of voters, not the particular incumbent in that situation. And that's why we basically added additional minority votes to that district, not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice.

(Defendants' Ex. 96, TR. 86)

178. Despite the fact that Representative Mallory, a black incumbent, has been elected with less than a majority of black population in H.D. 23, BEDO determined to increase the relative percentage of black population in

reconfiguring the district in accordance with totality of circumstances factors. Mr. Mattison testified:

> Q. Under the BEDO plan then why was black population added to Mr. Mallory's district.
>
> A. Well, you understand the need for attempting to balance this out. As I indicated, well, started to indicate to you, we began with a premise of 50.1 percent, the technical definition of majority. We then looked at circumstances that might impact either positively or negatively on the ability of that elected official to be elected and for those individuals to elect candidate of choice. We looked at such things as population drift. In his district, unfortunately as is true in a number of intercity urban districts there is population drift, and that population drift we felt needed to be looked at and compensated for over the decade in which that plan would be applicable.
>
> (Defendants' Ex. 98, TR. 32, 33)

179. BEDO's determination to increase relative black population in House District 23 was based on voting patterns, economic trends, and population drift. Mr. Mattison testified:

> Q. And you BEDO determined to add population to Mr. Mallory's district in a relative configuration that would increase the relative black population of his district?
>
> A. To an appropriate level based on our examination of totality of circumstances.
>
> Q. And that was because of your understanding of the requirements of the Voting Rights Act; is that correct?
>
> A. And our understanding generally of the need to empower the African-American communities, so I suppose the answer to that is yes, but we used again more than voting rights because as I indicated in my earlier testimony we examined economic issues and

those issues may still be in question in terms of their voting rights applicability, but we felt it was an important dynamic.

Q. Okay. Why didn't you just leave the relative percentage of 45 percent since Mr. Mallory has a history of being elected?

A. Well, as I said to you we took a look at a number of circumstances. What was the percentage of black/white, the relative percentage of black/white population drift out of the district? Were more black people moving out? Were more white people moving out? All of these things were weighted and examined and we made a determination after an examination of all of those circumstances, voting patterns, everything, economic trends in the district, we felt that the 55 percent was the most appropriate level. And, again, this was in consultation with the person who understands that district best and in the absence of the kind of detailed analysis that has traditionally been recognized by the court system that is a retrogressive sudy or the examination of best- and worst-case scenarios.

(Defendants' Ex. 98, TR. 34 and 35)

180. BEDO's determination to increase the relative black population of the minority incumbent districts was supported by Representative Mallory and all currently elected black officials. Mr. Mattison testified:

Q. Did you discuss House District 23 with Mr. Mallory before it was created?

A. Absolutely.

Q. Did he go along with your recommendation?

A. Yes, as was the case with all of the currently sitting black elected officials.

(Defendants' Ex. 98, TR. 38)

181. Floyd Johnson, on behalf of the NAACP, discussed minority districts with Representative Mallory in

his capacity as President of BEDO. Mr. Mallory's instruction was to increase and expand minority-majority districts. Mr. Johnson testified:

> Q. First of all, Bill Mallory in his capacity as president of the Black Elected Democrats of Ohio, did he express a goal or objective or purpose of the Black Elected Democrats of Ohio in terms of what they were attempting to do in reapportionment?
>
> * * * *
>
> A. His instruction to me was to increase and expand.
>
> Q. In what, in terms of what?
>
> A. In terms of minority representations, in terms of minority districts.
>
> Q. Okay. Did he take a position as to the affirmative creation of minority majority districts?
>
> * * * *
>
> A. His instructions to me were to create as many districts as possible. It was my understanding he fully supported what we were attempting to do.
>
> Q. Okay. When you say create as many districts are you referring to majority minority districts?
>
> A. That's correct.
>
> (Defendants' Ex. 97, TR. 43, 44)

182. Mr. Johnson increased the relative percentage of black population in House District 23, Representative Mallory's district, even though Representative Mallory has been elected in the district with less than a majority of black population. Mr. Johnson did so because Mr. Mallory's tenure is 26 years and a new black candidate would have less of an opportunity for election in the district because of a lack of incumbency advantage. Mr. Johnson testified:

Q. Did you increase the percentage, relative percentage of black population, in Mr. Mallory;s district? And I don't mean Mr. Mallory's district, but in the district he was serving.

A. We did.

Q. Okay. And why did you do that?

A. The NAACP's position is to try to create opportunities for minorities to continue in the Ohio State Legislator. And since Mr. Mallory's tenure was close to 26 years he may or may not be in the legislature in the year 2000.

So our thinking was to create a district where a minority could represent the district that Mr. Mallory represents even after his retirement.

Q. Well, I guess—let me phrase the question this way.

Some may contend, Mr. Johnson, that Mr. Mallory's district—strike that.

Some may contend that the district served by Mr. Mallory does not require an increase in black population because Mr. Mallory has been elected over a series of terms, a black candidate. What is your response to that?

A. Because of the historic polarized voting a candidate, a new candidate, minority candidate running in the same district, may have less of an opportunity first time out of getting elected because they lack incumbency. And that was the rationale in drafting and increasing slightly the minority proportion in his district.

(Defendants' Ex. 97, TR. 45, 46)

183. Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 to increase the relative percentage of black population in that district in order

to provide an opportunity for a new black candidate, without benefit of incumbency, to be elected in the district. Mr. Tilling testified:

> Q. All right. Why would you increase the black—relative black population of Representative Mallory's district?
>
> A. I really can't speak for why the minority did that, although it is true that Mallory is the president of BEDO. But I doubt if that is the reason.
>
> The only thing I can say about the plan submitted to us by the NAACP and the plan we drew ourselves, which also had a similar increase in Representative Mallory's district, again Representative Mallory has been a representative for more than 20 years. He is in his 60s. And since we are trying to create districts that would protect a class of voters, not the incumbent, we were in effect looking ahead to the time when perhaps Representative Mallory would not be there and running for reelection.
>
> Q. Was Mallory's district, that is prior District 23, one of those districts that had to be reconfigured in any event because of population requirements?
>
> A. I believe it was.

(Defendants' Ex. 96, TR. 107, 108)

184. BEDO also increased the relative percentage of black population in House District 25. Representative Rankin's District, even though Representative Rankin has been elected over a number of terms. Mr. Mattison testified that this was done to avoid minority vote dilution:

> Q. Okay. Now, in State Representative Rankin's district under the BEDO plan the black population increased from 53 percent in 1981 in that district to 61 percent in Rankin's district under the BEDO plan; is that correct?
>
> A. That's correct.

Q. Why did you make that increase? Why do you provide for that increase in black population?

A. The same answer as on the first. After an examination of totality of circumstanes we felt that that was the number necessary to avoid dilution.

(Defendants' Ex. 98, TR. 54).

185. With regard to both H.D. 23 and 25, Mr. Mattison testified:

Q. Why didn't BEDO maintain minority districts as they were in 1980 with a spread of black population of 12.20 percent up to 53 percent as opposed to creating two districts at 47 and 57 percent and taking black population from the remaining districts?

A. Well, primarily because of our understanding of totality of circumstances much of which was new to the political arena vis-a-vis the 1982 amendment to the Voting Rights Act that wasn't present in 1980, and based on our assessment these were the numbers that were required to comport with our understanding of the requirements.

(Defendants' Ex. 98, TR. 55, 56)

186. Mr. Johnson, the NAACP's representative, testified that House District 23 should be increased in black population even though Representative Rankin has been elected in the district. Representative Rankin not only benefits from incumbency but also name recognition. A new black candidate would require a district with increased black population to be successful. Mr. Johnson testified:

Q. And with regard to the districts presently served by Representative Rankin what did you do with that district?

A. Approximately 55 percent majority minority, so that was slightly increased.

Q. Okay. And slightly increased in terms of black population as a percent?

A. That's correct.

Q. Okay. And why did you slightly increase the black population as a percent of total population in the districts presently served by Representative Rankin?

A. Using the same principle as Representative Mallory, the district that he currently serves, Helen Rankin took over from her husband and she is getting on up in years, so she may or may not be the representative in the year 2000, so giving an opportunity for the next generation of blacks who might want to seek office in Ohio Legislator.

(Defendants' Ex. 97, TR. 46, 47)

187. Mr. Tilling, in drafting the 1991 Apportionment Plan, adopted the same rationale in increasing the relative black population of Representative Rankin's district. (Defendants' Ex. 96, TR. 105-106.

188. In Franklin County, BEDO increased the relative black population of House District 29 (Miller) and 31 (Beatty) even though these Representatives have been elected for years in districts with less than a majority black population. Mr. Mattison testified:

Q. So you increased Ray Miller's district more than the majority did in adopting the '91 plan?

A. In this particular case.

Q. Well, tell me generally why you went from 38 percent to 50 percent in Ray Miller's district?

A. Well, again, we looked at the totality of circumstances, looked at a number of issues and came to the conclusion that these were the figures necessary again to comply with our understanding of the Voting Rights Act.

(Defendants' Ex. 98, TR. 58)

* * * *

Q. In this district (Beatty's) if we look at the comparison we move from 46 black population to 52 percent black population in the BEDO plan, correct?

A. Correct.

Q. And why did you provide for that increase?

A. Based on an assessment of totality of circumstances we believe that 52 percent to be required and necessary based on our assessment.

Q. Okay. Total population is 104,972 under the BEDO plan, 106,608 under the majority plan, correct?

A. (Witness nods head.)

Q. You'll have to answer audibly.

A. Yes.

Q. And you discussed that change with Mr. Beatty and he agreed to it?

A. As I said we discussed all the plans with each of the members.

Q. The net effect of what you did was to make Beatty's district a majority minority district in terms of a percentage over 50 percent rather than Miller's?

A. Well, again that is not our definition of majority minority, it's not based on absolute numbers.

Q. In any event Mr. Beatty's district being a district of over 50 percent, Mr. Miller's remained a district of less than 50 percent. Why did you do it that way as opposed to making Miller a district over 50 percent and Beatty not?

A. Totality of circumstances indicated to us that those figures were the most appropriate figures under the circumstances and based again on our analysis.

(Defendants' Ex. 98, TR. 63, 64)

189. Mr. Tilling, in drafting the 1991 Apportionment Plan, reconfigured House Districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed. He testified:

The difficulty that we faced here is that there were several indications that one or both of these individuals would desire to run for a different office. Representative Beatty had been talked about as a possible candidate for State Senate; Representative Miller sought the Democrat nomination for Secretary of State in 1990 and was encouraged by party leadership to stay in place but has made no secret of the fact he would like to run for another office down the road.

It's our judgment the Voting Rights Act really requires you to try to protect classes of voters and not particular incumbents. And since there was some concern that one or both of these individuals might not serve out the decade we tried to reconfigure the districts in accordance with our understanding of the Voting Rights Act but yet do as little to change them as we thought was necessary—in other words, to make the minimum changes necessary to achieve the requirements of the Voting Rights Act.

And so as you can see, the black voting age population in District 21, which would be the new district that Representative Beatty is in, is just barely over 50 percent. And that was done in such a way that it did not decrease the minority population in Representative Miller's district. In fact, we were able to add minority voters to his district as well. Therefore I believe we have protected the ability of minority voters in both those House districts to elect a candidate of their choice, regardless of the plans, of the current two incumbents.

In addition to that I might point out, although we're not talking directly about the Senate, we also were informed at the public hearings in Columbus that one of the complaints the minority community had was that the previous House districts were con-

figured in such a way as to work against the ability of minorities to elect a candidate of their choice to the State Senate. And so as we were trying to reconfigure the House districts into a Senate district we tried to take that into consideration. And I do believe that we created a State Senate district here in Franklin County for the first time that gives minorities a chance to elect a candidate of their choice. And currently the Senate Democratic caucus is in the process of filling a vacancy and the candidate recommended for that position is a black woman. And she has been recommended to the Senate Democrats by the Franklin County Screening.

Q. What Senate district is that?
A. It would be Senate District 15.

(Defendants' Ex. 96, TR. 103-104)

190. Since the deposition of Mr. Tilling, the Senate Democratic Caucus has appointed Ben Espy, former member of the Columbus City Council, as a minority appointee to Senate District 15.

191. In Montgomery County, BEDO increased the relative black population in both House District 36 (McLin) and House District 37 (Roberts) even though these minority Representatives have been elected in districts with less than a majority black population. The factors considered included population drifts, voting trends and relative shifts in black population between the districts. Mr. Mattison testified:

Q. Why did you increase Roberts' district in terms of black population?

A. Based on our assessment of totality of circumstances.

Q. But Roberts has been elected with 36 percent black population.

A. Well, again, there are a number of circumstances just beyond the issue of electability. There

is also population drift in his district in such position that in five years he will lose the necessary numbers. Those kind of issues were all examined in totality of circumstances, and quite frankly his own assessment of voting trends, what kind of folk in fact were moving in. The crossover voting issue was also discussed with each of the members by Dr. Brisker as he went around the State to do this assessment.

Q. Did you, when you were considering totality of circumstances in Montgomery County did you consider the fact that McLin's district was losing black population to Roberts' district?

A. Yeah, we knew that, that that was occurring but again there is an overall drift in McLin's district towards the southern suburbs. So that the population numbers didn't really tell the story.

Q. But you had to take into account the fact that Roberts—McLin's district was losing black population and Roberts' district was increasing black population?

A. That's right, but we also took into consideration voter turnout and the fact that in McLin's district a strong GOTV machine had been built by the late State Representative C.J. McLin so that the percentage of the voting behavior of those African-Americans in that district was proportionately greater than in Representative Roberts' district.

(Defendants' Ex. 98, TR. 70-72)

192. Floyd Johnson, in drafting the NAACP, also took into account population shifts in Montgomery County in recommending a relative increase in black population in House District 36 (McLin). He testified:

There has been on the books in Montgomery County since 1960 a proposed U.S. 35 West project. And during the last five years a portion of that family was built. And approximately 20,000 residents dur-

ing that ten-year period were displaced. Over the next ten years we anticipate that U.S. 35 West will join with what is called the Trotwood connector in which a substantial portion of the population will be displaced, and that population would be in the proposed district—in the plan that we recommended—that currently Rhine McLin serves in.

So taking that into consideration, the reason that we attempted to maintain the majority minority district in the one that Ms. McLin currently represents, is that once that population is displaced then the district in which Tom Roberts represents will then become the minority majority because of the historical movement of the black population from the eastern part of the Dayton area to the northwest corridor, which is now the City of Trotwood, which increased from a 25 percent black population to 45 percent black population, 44 percent black population over the past ten years. If the migration continues then once the highway is extended then those people will move into Roberts' district.

Q. Would it be fair—I am sorry, were you done?

A. I am done.

Q. Would it be fair then to say that based on the demographics in Montgomery County there is movement of black population from the district currently served by Representative McLin into the district served, currently by Representative Roberts?

* * * *

A. Absolutely.

Q. And is that why you came to the final conclusion you did on the relative percentages of black population in each one of those districts?

* * * *

A. That's correct.

(Defendants' Ex. 97, TR. 48-50)

193. In drafting the 1991 Apportionment Plan, Mr. Tilling also took into account the population shifts in Montgomery County in reconfiguring districts in that county. He testified:

> And based on our judgment, which actually was again the plan—we accepted the plan that they prepared. We decided to preserve the Rhine McLin district with a slight plurality black voting age population because our understanding of the circumstances is that the population movement is from the McLin district to the Roberts district and therefore over the decade that gave us the best opportunity to retain essentially the same population figures that we have as we began this process.
>
> Q. Okay. McLin's district, 36, is that a district that met the population requirements?
>
> A. No. Her district had too many people in it and we had to remove people from the district.
>
> Q. And so did you reconfigure that district?
>
> A. Yes, we did.
>
> Q. And did you reconfigure it in order to avoid dilution by minority voting.
>
> A. Yes, we did, especially as I said in light of population trends throughout the decade.
>
> Q. In this situation the black population percentage in 1981 went from 36.10 percent in your plan to 32.35 percent. Why was that done?
>
> A. Well, as I indicated, I think basically the situation was such that because Rhine McLin essentially was—I should say succeeded her father and basically had a minority district, we were able to make relatively few changes there. But in order to barely give her the majority black voting age population, 50.7, which is, we felt, the least that we needed to do and because that's where the black population is now and therefore she is entitled to retain that, we essentially gave her a boost at the beginning of the decade because as this decade unfolds she is going to

lose that population and white population in the district may grow at a faster rate and therefore her population, if we didn't increase it now, it would fall dangerously low and possibly jeopardize her chances for reelection.

(Defendants' Ex. 96, TR. 109, 110)

194. In Summit County, both BEDO and the NAACP increased the relative percentage of black population in House District 42 (Sykes) based on the fact that the district was losing black population and to avoid minority vote dilution. (Defendants' Ex. 78, TR. 75; Defendants' Ex. 97, TR. 50). Mr. Tilling testified:

Again in Summit County we had a district represented by Vern Sykes, and according to the 1990 census his black population figure was 35.4 percent. We increased that to 43 percent, but again black voting age population was just slightly under 40. So we did try to prevent a black voter dilution by returning the minority community to Representative Sykes and Democrats did a very similar thing. In fact, they increased his to a higher level than ours, 47 percent in their figures as compared to 43 in ours. Both sides recognized the need to reconfigure those districts. And I am not sure what explains why they have about three and a half percent more, but the fact of the matter is both sides recognized that was the appropriate course of action.

(Defendants' Ex. 96, TR. 111)

195. In Lucas County, BEDO increased the relative percentage of blacks in House District 45 (Jones) due to population changes in the district. Mr. Mattison testified:

Q. Was there anything specific under totality of circumstances?

A. Again, there were a whole list of things ranging from the growth of a university center that was

in Representative Jones' district. I remember that was one of the issues. He had the University of Toledo and the growth of that university had essentially displaced a number of individuals who resided there and that it caused some shift in terms of the kind of population that were in his district. So that was one of the things we looked at.

(Defendants' Ex. 98, TR. 80, 81)

Mr. Tilling accepted this rationale as well as the age of the minority incumbent in reconfiguring House District 45. (Deposition of Tilling, Defendants' Ex. 96, TR. 112).

196. In short, reconfiguration of minority districts must take into account population shifts, demographics, voter turnout, racial bloc voting, incumbency factors, voting patterns, and other totality of circumstances factors.

5. *Roll Call Analysis*

197. Plaintiffs in *Quilter v. Voinovich* offered a "roll call analysis" to attempt to establish white Democratic incumbents support for legislation of interest to minorities. The roll call analysis was prepared by a Lisa Handlee who was never called as a witness by Plaintiffs and whose deposition was, therefore, not taken. Gordon Henderson knew nothing of the roll call analysis. (Deposition of Henderson, Defendants' Ex. 99, TR. 197-199).

198. Defendants' Exhibit 62 is a roll call analysis prepared by James R. Tilling. The analysis indicates strong Republican support for bills of interest to minorities. Absent Republican support in the Senate, the bills would never have been passed. (Defendants' Ex. 96, TR. 114-126).

III. EQUAL PROTECTION/FOURTEENTH AMENDMENT

A. Alleged Political Gerrymandering

199. Defendants' Exhibits 60 and 61 are comparisons of the allegedly Democratic leaning and allegedly Republican leaning districts in the 1991 Apportionment Plan and the 1991 Minority Plan proposed by Plaintiffs' Ferguson and Quilter. The comparisons are based on the Political Index relied upon by Plaintiffs when they argued that the 1991 Apportionment Plan was a political gerrymander. Defendants' Exhibit 60 summarizes the results in the two plans for all major urban counties in Ohio. (Defendants' Ex. 96, TR. 114-126). Defendants' Exhibit 60 provides:

	1991 Majority Plan		1991 Minority Plan	
	Democrat	Republican	Democrat	Republican
Cuyahoga	10	3	11	2
Franklin	3	6	3	6
Hamilton	2	6	2	6
Montgomery	2	4	3	3
Lucas	3	2	4	1
Summit	3	2	2	3
Total	23	23	25	21

(Defendants' Ex. 60)

200. Using the Plaintiffs' proposed analysis, there is only a two (2) seat difference in the 1991 Apportionment Plan and the plan submitted by Messrs. Ferguson and Quilter in the six (6) major urban counties in Ohio. Under the 1991 Apportionment Plan, 23 Republican leaning and 23 Democratic leaning districts were created, based on the Political Index relied upon by Plaintiffs. This compares to 25 Democratic and 21 Republic leaning districts in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Deposition of James R.

Tilling, Defendants' Ex. 96, TR. 114-126; Defendants' Ex. 60). Plaintiffs' expert, Robert Dykes, admitted this difference. (Deposition of Robert Dykes, December 13, 1991, Defendants Ex. 100, TR. 44).[8]

201. Statewide, using the Plaintiffs' measurements, there is only a difference of four (4) seats in the 1991 Apportionment Plan and the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Defendants' Ex. 96, TR. 131). Defendants' Exhibit 68 compares the results in the two plans, again based on Plaintiffs' Political Index. The results are:

1990 Statewide Races

1991 Majority Plan	**58 R - 41 D**
1991 Minority Plan	**54 R - 45 D**

202. According to the Plaintiffs' measurements, there is only a possible four (4) seat difference in the 1991 Apportionment Plan and the plan offered by the Democrats based on Plaintiffs' Political Index and the 1990 statewide races. (Defendants' Ex. 68; Defendants' Ex. 96, TR. 130, 131).

203. Plaintiffs' expert, Robert Dykes, admitted that the difference statewide was only five (5) seats by his personal calculation. (Deposition of Dykes, December 13, 1991, Defendants' Ex. 100, TR. 44).

204. There are currently 61 Democrats and 38 Republicans in the Ohio House of Representatives. (Defendants' Ex. 67; Defendants' Ex. 96, TR. 128).

205. In the 1990 statewide races (Governor, Treasurer, Secretary of State, Attorney General and Auditor), the vote statewide was split 52% Democratic and 48% Republican. (Defendants' Ex. 96, TR. 133).

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[8] The deposition of Robert Dykes taken on December 13, 1991 is submitted as Defendants' Exhibit 100.

206. There is no correlation in the current political make-up of the Ohio House of Representatives and the political climate in Ohio based on the 1990 statewide races. (Defendants' Ex. 96, TR. 126-128).

207. A four seat difference statewide between the 1991 Apportionment Plan and the 1991 Minority Plan as prepared by Plaintiffs' Ferguson and Quilter does not establish political gerrymandering particularly where the current membership in the Ohio House is 61 Democrats and 38 Republicans. (Defendants' Ex. 96, TR. 126-128; Defendants' Exs. 67 and 68).

208. The 1971 and 1981 apportionment plans are gross partisan Democratic gerrymanders. (Defendants' Ex. 95, TR. 7).

209. Campaign financing and incumbency are significant factors in any election. The Democrats currently have the edge in both, having 61 members in the Ohio and $3 to $4 million in available funds for House campaigns compared to $200,000 for Republicans. (Defendants' Ex. 96, TR. 126-128).

B. Reliance On The Political Index For 1990

210. Gordon Henderson, Plaintiffs' expert in *Quilter v. Voinovich*, analyzed the political leanings of the districts configured in the 1991 Apportionment Plan based on a Political Index, calculated as the average of the 1990 statewide races. (Deposition of Henderson, Defendants' Ex. 99, TR. 95).

211. Gordon Henderson only reviewed two (2) out of eighty-eight (88) counties for his conclusions. These counties were Hamilton and Franklin. (Henderson Exhibits 14 and 16; Deposition of Henderson, Defendants' Ex. 99, TR. 43, 194).

212. Henderson never employed the Political Index in any court proceeding previously. (Deposition of Henderson, Defendants' Ex. 99, TR. 81). Henderson never testified in a court proceeding where claims of political gerry-

mandering were upheld. (Deposition of Henderson, Defendants' Ex. 99, TR. 81).

213. Regarding the only two (2) counties analyzed by Mr. Henderson, Hamilton and Franklin, the ultimate results indicated that the 1991 Apportionment Plan created three (3) Democratic leaning districts and six (6) Republican leaning districts in Franklin County and two (2) Democratic leaning and six (6) Republican leaning districts in Hamilton County—*precisely* the same configuration as created in the 1991 Minority Plan proposed by the Democrats themselves. (Defendants' Ex. 60; Defendants' Ex. 96, TR. 114-126).

214. Henderson never reviewed the results in the Ohio Senate. (Deposition of Henderson, Defendants' Ex. 99, TR. 105).

215. Henderson analyzed districts in Hamilton and Franklin County and attempted to trace "pieces" in the districts in the reconfiguration. Henderson conceded that districts must be reconfigured because of the population requirements of the Ohio Constitution. (Deposition of Henderson, Defendants' Ex. 99, TR. 192). Henderson also conceded that districts were similarly reconfigured in the 1991 Minority Plan proposed by the Democrats. (Deposition of Henderson, Defendants' Ex. 99, TR. 159).

216. Henderson performed no analysis of the requirements of the Ohio Constitution, although acknowledging on cross examination that Article XI, Sections 10(C), 8 and 11 addressed the allocation of fractions of counties in the apportionment process. (Deposition of Henderson, Defendants' Ex. 99, TR. 131, 158).

217. Henderson conceded that population shifts in Hamilton and Franklin County districts would require reconfiguring the districts, conceding that "Population shifts are exactly what mandate a new redistricting plan". (Deposition of Henderson, Defendants' Ex. 99, TR. 131, 158).

218. Henderson could not correlate the "pieces" of districts in the 1991 Apportionment Plan that were reconfigured, and offered no support whatsoever as to how these "pieces" correlated with wards and precincts. (Deposition of Henderson, Defendants' Ex. 99, TR. 163). Henderson conceded that in order to meet population requirements for the districts, districts had to be reconfigured by wards and precincts. He testified:

> Q. In order to meet population requirements for any given district you may have to reconfigure that district by adding or subtracting wards and precincts to come up with the population requirement, itsn't that true?
>
> A. That may happen, sure.
>
> (Deposition of Henderson, Defendants' Ex. 99, TR. 164).

219. In reply, James R. Tilling testified that in order to meet population requirements and to avoid minority voter dilution as proscribed by Section 2 of the Voting Rights Act, districts in Hamilton and Franklin County, as well as all major urban counties, had to be substantially reconfigured. (Defendants' Ex. 96, TR. 161).

220. Henderson's reliance on a Political Index on statewide elections for one year is absurd. A Political Index may vary widely depending on the results of the races at the statewide level. (Defendants' Ex. 96, TR. 131). Defendants' Exhibit 68 compares the Political Index and results in Ohio House compositions for the years 1982, 1986, 1988 and 1990. Defendants' Exhibit 68 indicates the following results:

	1990 Statewide Races	1988 Statewide Races	1986 Statewide Races	1982 Statewide Races
1991 Majority Plan	58R-41D	59R-40D	83D-16R	69D-30R
1991 Minority Plan	54R-45D	53R-46D	81D-18R	72D-27R

221. Accordingly, Plaintiffs' Political Index based on the average of the 1990 statewide races would indicate 58 districts leaning Republican and 41 districts leaning Democratic in the 1990 Majority Plan while, in 1986, for example, the Political Index, calculated in the same fashion, would indicate 83 districts leaning Democratic and 16 Republican for the same apportionment plan. (Defendants' Ex. 68).

222. Plaintiffs' reliance on a Political Index to indicate the political leaning in any given house district is ridiculous since such a Political Index, based on an average of the statewide races, bears no correlation to the results in the Ohio House and since a Political Index varies dramatically by year based on the results of statewide elections. A Political Index based upon a single election cycle is simply not an accurate prediction of the political profile of any house district in any future election. (Defendants' Ex. 96, TR. 128, 130-131).

223. The 1991 Apportionment Plan was adopted on October 1, 1991 and published on October 5, 1991. (Defendants' Ex. 96, TR. 34, 35). Therefore, the 1991 Apportionment Plan has not yet been effective to govern any election.

C. *Partisan Bias*

224. Dr. Gary King, Defendants' expert, conducted an analysis of the partisan bias in the 1981 apportionment plan, the 1991 Apportionment Plan (the "Tilling Plan"),

the 1991 Democrats' Plan and the 1991 plan submitted by the Ohio Republican Party. (Deposition of King, Defendants' Ex. 95, TR. 14).

225. Dr. King performed this analysis based on district and precinct level data for Ohio House and Senate elections. (Defendants' Ex. 95, TR. 7).

226. Dr. King conducted the analysis of partisan bias by use of a seats/vote curve, a methodology standardly accepted in the field for over 100 years. (Defendants' Ex. 95, TR. 13, 14).

227. Partisan bias is measured by partisan symmetry. Partisan symmetry provides that political parties are treated fairly in the electoral system if votes are symmetrical to the number of seats awarded in an election. (Defendants' Ex. 95, TR. 16).

228. The seats/votes curve methodology is a regression methodology. Dr. King conducted a regression analysis and then calculated the variance around the seats/votes curve with standard deviations. (Defendants' Ex. 95, TR. 21).

229. Defendants' Exhibit 88 is an analysis of the 1971 and 1981 apportionment plans prepared by the Democrats in prior apportionments for the Ohio House. The analysis indicates that the 1971 and 1981 apportionment plans were heavily biased in favor of the Democrats in the Ohio House. (Defendants' Ex. 95, TR. 28-30).

230. Indeed, the 1971 apportionment prepared by the Democrats is the most partisan plan ever recorded in the political science literature. The 1981 apportionment plan prepared by the Democrats is also significantly biased in favor of the Democrats. See Dr. King's article "Estimating Federal Consequences of Legislative Redistricting" published in the *Journal of American Statistical Association*. (Defendants' Ex. 95, TR. 7).

231. Defendants' Exhibit 90 reflects the results of Dr. Kings' analysis for the four plans in question for the Ohio House. The analysis indicates that both the 1981 apportionment plan and the 1991 plan proposed by Plaintiffs Ferguson and Quilter are heavily biased in favor of the Democrats. The 1991 plan offered by the Ohio Republican Party is biased in favor of the Republicans. However, the 1991 Apportionment Plan (the "Tilling Plan") is not biased in favor of any political party. (Defendants' Ex. 95, TR. 33-34).

232. The results of Dr. King's analysis indicates that the 1991 Apportionment Plan reflects an average partisan bias of only -0.006, less than the standard error of .011. Accordingly, the 1991 Apportionment Plan is very nearly perfectly fair. (Defendants' Ex. 95, TR. 34).

233. Defendants' Exhibit 91 reflects the results of Dr. King's analysis for the Ohio Senate. Again, the 1981 Apportionment Plan cannot be statistically distinguished from zero partisan bias. (Defendants' Ex. 95, TR. 37).

234. The results of Dr. King's regression analysis indicates that the 1991 Apportionment Plan is statistically indistinguishable from zero partisan bias for both the Ohio House and Senate, is fair and is not a partisan gerrymandered plan. (Defendants' Ex. 95, TR. 34, 37). See also Transcript of Board Hearing, February 11, 1992. TR. 46-55.

D. *Paired Incumbents*

235. In preparing the 1991 Apportionment Plan, Mr. Tilling did not intentionally pair any incumbents. Mr. Tilling intended to create a fair plan because he anticipated that the plan could be the subject of a judicial proceeding. (Defendants' Ex. 96, TR. 135, 136).

236. In Cuyahoga County, incumbents have to be paired in one district because Cuyahoga County lost one

whole house district as a result of the 1990 census. (Defendants' Ex. 96, TR. 140).

237. In Mahoning County, Representatives Vukovich and Gerberry are paired as a result of the court's order in *Armour v. State of Ohio.* Plaintiffs Ferguson and Quilter also paired Vukovich and Gerberry in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter as proposed. (Defendants' Ex. 96, TR. 138).

238. In the 1991 Minority Plan, Plaintiffs Ferguson and Quilter themselves paired eight (8) representatives. They paired Representatives Whalen and Bergansky, Representatives Campbell and Sheerer, Representatives Mahnic and Mottl; Representatives Conley and Davidson and Representatives Vukovich and Gerberry. (Defendants' Ex. 96, TR. 138).

239. Mr. Tilling did not realize that incumbents were paired in the 1991 Apportionment Plan until after September 26, 1991 when the proposed plans were submitted. Between September 26 and October 1, 1991, Mr. Tilling modified the Majority Plan to *unpair* incumbents wherever possible. Specifically, Tilling unpaired Representatives Mottl and Colonna. Representatives Pringle and Sweeney and Representatives Whalen and James—all Democrats. (Defendants' Ex. 96, TR. 136, 138, 181).

240. Only three pairs of incumbents remain paired today. In all the remaining pairs of incumbents, one incumbent has elected to move to another district. The only pairs of incumbents remaining are Representatives Campbell and Sheerer, Representatives Skeen and Seese and Representatives Gerberry and Vukovich. (Deposition of W. Pfeiffer, December 14, 1991, TR. 7-9).

IV. OHIO CONSTITUTIONAL ISSUES

241. The Ohio Supreme Court, in *Voinovich v. Ferguson* (1992), —— Ohio St. 3d —— held that the 1991 Apportionment Plan complies with Article XI of the

Ohio Constitution. The persons responsible for apportionment address the Ohio Constitutional issues without waiver of their position that the Federal District Court in *Quilter v. Voinovich* must follow the decision of the Ohio Supreme Court. The following findings are provided without waiver of this position.

242. Article XI, Section 7(A) provides:

> (A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. *To the extent consistent with the requirements of Section 3 of this Article*, the boundary lines of districts shall be so drawn as to delineate an area containing *one or more whole counties.*
>
> (Emphasis added)

(Defendants' Ex. 12).

243. Article XI, Section 7 generally governs the establishment of *boundary* lines of house of representative districts. Article XI, Section 7(A) does not require the creation of "whole county districts". Instead, the creation of "whole county districts" is governed by Article XI, Sections 10(A) and 10(B). Article XI, Section 7(A) does not require that districts contain more than one whole county but merely requires that a district contain *"one or more* whole counties". (Deposition of James R. Tilling, Defendants' Ex. 96, TR. 140).

244. In the 1991 Apportionment Plan, there are fifty-six (56) whole counties contained within house districts in the 1991 Apportionment Plan. (Defendants' Ex. 22; Defendants' Ex. 96, TR. 142).

245. The 1991 Apportionment Plan fully complies with Article XI, Section 7(A). (Defendants' Ex. 96, TR. 142-144).

246. Article XI, Section 7(D) provides:

> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be *adopted to the extent* reasonably consistent with the requirements of Section 3 of this Article.
>
> (Emphasis added)

(Defendants' Ex. 12).

247. Given the major population shifts described above, relatively few of the districts established in the 1981 apportionment are even eligible to be considered for retention under Article XI, Section 7(D). (Deposition of James R. Tilling, Defendants' Ex. 6, TR. 144-145).

248. Robert Dykes, Plaintiffs' expert in *Quilter v. Voinovich*, agreed that the provisions of Article XI, Section 7(D) cannot be applied in a vacuum. The condition in Section 7(D) that previously established districts be retained "to the extent reasonably consistent with the requirements of Section 3 of this Article" must include consideration of the population not only within the district under review but also in the adjoining districts surrounding the district under review. (Deposition of Dykes, Defendants' Ex. 80, TR. 35, 38, 44). Accordingly, even though a particular district otherwise satisfies the population requirements of Article XI, Section 3, that district cannot be retained in the 1991 apportionment if population requirements in adjoining or surrounding districts under Article XI, Section 3 preclude retaining the districts under review. (Deposition of Dykes, Defendants' Ex. 80, TR. 35, 36).

249. Further, both Mr. Tilling and Mr. Dykes agreed that other sections of Article XI of the Ohio Constitution preclude retention of districts under Article XI, Section 7(D). Most particularly, the requirements of Article XI, Section 8 take precedence over the requirements of Article XI, Section 7(D). (Depositions of James R. Tilling, De-

fendants' Ex. 96, TR. 145; Deposition of Dykes, Defendants' Ex. 80, TR. 40).

250. The 1991 Apportionment Plan, retains House Districts 1, 3, 4, 5, 79, 82, 83 and 86 pursuant to Article XI, Section 7(D). (Defendants' Ex. 96, TR. 144).

251. In drafting the 1991 Apportionment Plan, Mr. Tilling could not retain House Districts 89, 90, 91, 94, 95 and 96 because of population requirements of Article XI, Section 3 in configuring adjacent districts and because of the requirements of Article XI, Section 8. (Defendants' Ex. 96, TR. 145).

252. The 1991 Apportionment Plan fully complies with the requirements of Article XI, Section 7(D). (Defendants' Ex. 96, TR. 142-145).

253. The population of House District 68 in the 1991 Apportionment Plan is 99,997 or 91.26% of the ideal population in a house district of 109,567. The population of Senate District 32, which includes House District 68, is also 10% less than the minimum population requirements of Article XI, Section 4. Specifically, the population of Senate District 32 is 93.99% of the ideal Senate population of 308,942 people and slightly less than the minimum requirements of that section (95% of the ideal Senate population). (Defendants' Ex. 96, TR. 146-151).

254. The Ohio Supreme Court in *Voinovich v. Ferguson* (1992), —— Ohio St. 3d —— held that the configuration of House District 68 and Senate District 32 complies with the Ohio Constitution and found "the plan to be Constitutional."

V. ALTERNATIVE PLANS CONSIDERED

A. 1991 Apportionment Plan As Technically Amended

255. At the February 18, 1992 Apportionment Board hearing, Mr. Tilling offered the 1991 Apportionment Plan, amended to correct technical errors. This plan will be

referred to as the "Amendment D to the 1991 Apportionment Plan". This plan corrects all technical errors in the 1991 Apportionment Plan. Otherwise, the plans are identical.

B. Alternative Plan

256. At the February 18, 1992 Apportionment Board hearing, Mr. Tilling offered an alternative plan for the Board's consideration, "Amendment E". This plan retains all basic elements of the 1991 Apportionment Plan ("Amendment D") except that minority districts were retained at approximately the same relative black population percentage, where possible, as existed in the 1981 plan with 1990 census figures. The following indicates the black populations for minority districts under this Amendment E.

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 7D PLAN, 1991 MAJORITY, AND 1991 MAJORITY AMENDMENT "D"

1981 Democrat Plan	7D Plan	1991 Majority Plan		1991 Majority Amendment "D"	
6-19 Cuyahoga	6-18 Cuyahoga [1]	8-20 Cuyahoga		8-20 Cuyahoga	
16—94.67% [1]	16—70.1%	10—63.42% [2]	67.35% [1]	10—63.42% [2]	67.35% [1]
14—90.05%	14—65.6%	12—65.13%	67.25%	12—65.13%	67.25%
12—74.80%	12—64.3%	8—61.41%	65.64%	8—61.41%	65.64%
15—34.80%	11—55.6%	9—58.36%	62.30%	9—58.36%	62.30%
*17—26.14%	17—26.0%	11—40.61%	43.01%	11—40.61%	43.01%
18—14.70%	15—19.1%	14— 6.86%	7.92%	14— 6.86%	7.92%
19—14.40%	18—11.1%	19— 3.71%	4.63%	19— 3.71%	4.63%
*13— 4.99%	13— 5.0%	15— 3.25%	3.29%	15— 3.25%	3.29%
11— 4.44%	9— 3.7%	17— 2.34%	2.85%	17— 2.34%	2.85%
9— 4.16%	7— 2.4%	13— 2.32%	2.75%	13— 2.32%	2.75%
* 7— 2.36%	8— 2.3%	18— 1.31%	1.41%	18— 1.31%	1.41%
8— 2.12%	10— .6%	16— 0.45%	0.47%	16— 0.45%	0.47%
*10— 0.64%	6— .5%	20— 0.23%	0.31%	20— 0.23%	0.31%
* 6— 0.49%					

[1] Black percentage of total population
[2] Black Voting Age Population
* Meets Population Requirements

28-35 Franklin	19-26 Franklin	21-29 Franklin		21-29 Franklin	
31—46.80%	21—46.2%	21—50.30%	55.92%	21—48.3%	54.3%
*29—38.50%	19—38.5%	22—44.13%	48.29%	22—40.98%	44.68%
*32—26.60%	22—26.6%	26— 8.07%	8.66%	26— 8.07%	8.66%
30—12.40%	20—11.2%	25— 7.96%	8.41%	25— 7.96%	8.41%
28— 5.90%	26— 6.2%	23— 7.78%	8.32%	23— 8.95%	9.79%
34— 5.10%	24— 4.8%	29— 4.47%	4.32%	29— 4.47%	4.32%
33— 4.10%	23— 4.3%	24— 3.92%	4.22%	24— 3.92%	4.22%
35— 1.40%	25— 2.3%	28— 3.56%	3.75%	28— 3.56%	3.75%
		27— 3.09%	3.57%	27— 3.09%	3.57%

20-27 Hamilton	27-34 Hamilton	30-37 Hamilton		30-37 Hamilton	
25—53.20%	28—60.9%	30—56.83%	61.07%	30—52.72%	55.98%
23—45.90%	33—47.1%	31—52.60%	59.82%	31—43.13%	49.16%
24—32.30%	34—26.4%	32—21.58%	24.00%	32—20.76%	24.41%
22—12.60%	31—13.7%	35— 7.91%	8.96%	35— 8.97%	10.14%
27—12.20%	32—12.6%	33— 7.50%	8.04%	33—11.84%	15.38%
20— 8.90%	27— 3.6%	36— 4.08%	4.49%	36— 4.08%	4.49%
21— 7.50%	30— 2.7%	37— 1.94%	2.14%	37— 1.94%	2.14%
26— 2.70%	29— 2.5%	34— 1.90%	2.14%	34— 1.90%	2.14%

1981 Democrat Plan	7D Plan	1991 Majority Plan		1991 Majority Plan Amendment "D"	
36-40 Montgomery	35-39 Montgomery	38-43 Montgomery		38-43 Montgomery	
36—42.10%	36—43.7%	38—50.70%	54.78%	38—40.1%	43.50%
*37—36.10%	37—40.0%	39—29.23%	32.35%	39—38.28%	41.69%
40— 6.20%	39— 4.7%	43— 3.61%	3.86%	43— 3.61%	3.86%
*39— 4.70%	35— 2.5%	40— 2.84%	3.30%	40— 2.84%	3.30%
38— 0.91%	38— .9%	42— 2.28%	2.76%	42— 2.28%	2.76%
		41— 1.18%	1.31%	41— 1.18%	1.31%
41-44 Summit	40-43 Summit	44-48 Summit		44-48 Summit	
*42—35.40%	42—35.2%	44—39.52%	43.26%	44—39.86%	43.07%
*44— 9.00%	40— 9.0%	45— 5.40%	6.29%	45— 5.40%	6.29%
*43— 2.90%	43— 2.9%	47— 5.00%	6.00%	47— 5.00%	6.00%
*41— 2.30%	41— 2.3%	46— 1.12%	1.33%	46— 1.12%	1.33%
		48— 0.61%	0.53%	48— 0.61%	0.53%
45-48 Lucas	44-47 Lucas	49-52 Lucas		49-52 Lucas	
*45—41.70%	45—41.70%	49—47.65%	50.92%	49—46.42%	49.9%
47—13.20%	47—12.3%	52— 4.85%	5.65%	52— 4.85%	5.65%
*46— 5.30%	46— 5.3%	50— 4.23%	5.46%	50— 4.23%	5.46%
48— 2.80%	44— 2.8%	51— 2.18%	2.40%	51— 2.18%	2.40%

49-51 Stark	54-57 Stark		54-57 Stark	
50—14.90%	54—12.93%	15.15%	54—12.93%	15.15%
49— 4.43%	55— 3.39%	3.84%	55— 3.39%	3.84%
51— 1.30%	57— 2.64%	2.98%	57— 2.64%	2.98%
	56— 1.15%	1.20%	56— 1.15%	1.20%
52-53 Mahoning	**64-65 Mahoning**		**64-65 Mahoning**	
53—27.80%	64—31.19%	35.53%	64—31.19%	35.53%
52—10.50%	65— 1.48%	1.64%	65— 1.48%	1.64%

Total (Minority Districts Over 10%)

24	16	16

Total (Minority-Majority (Over 50%))

4	8	9

C. Cuyahoga County Changes—Amendment F

257. Finally, at the February 18, 1992 Apportionment Board hearing, Mr. Tilling offered an alternative (Amendment "F") to the 1991 Apportionment Plan reflecting changes in the minority districts in Cuyahoga County. This plan creates five (5) majority-minority districts in Cuyahoga County as follows:

	Black VAP	Black Population
H.D. 8	61.7%	66.0%
H.D. 9	58.4%	62.3%
H.D. 10	59.5%	63.3%
H.D. 11	54.2%	56.8%
H.D. 12	53.7%	57.6%

D. Democrats' "7(D)" Plan As Revised

258. Messrs. Ferguson and Quilter have submitted an alternative plan referred to as the "7(D)" plan.

259. The 7(D) Plan retains the relative black populations reflected in the 1981 plan with 1990 census populations. A comparison of the relative black populations in the 1981 plan, the "7(D)" plan and the 1991 Mapority Plan (the 1991 Apportionment Plan) follows:

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRATIC PLAN, 7D PLAN AND 1991 MAJORITY APPORTIONMENT PLAN

	1981 Democrat Plan	7D Plan		1991 Majority Plan	
	6-19 Cuyahoga	6-18 Cuyahoga [1]		8-20 Cuyahoga	
(Whalen)	16—94.67% [1]	16—68.9% [2]	70.1%	10—63.42% [2]	67.35% [1]
(Prentiss)	14—90.05%	14—61.2%	65.6%	12—65.13%	67.25%
(James)	12—74.80%	12—60.6%	64.3%	8—61.41%	65.64%
	15—34.80%	11—53.6%	55.6%	9—58.36%	62.30%
	*17—26.14%	17—24.4%	26.0%	11—40.61%	43.01%
	18—14.70%	15—18.0%	19.1%	14— 6.86%	7.92%
	19—14.40%	18—10.1%	11.1%	19— 3.71%	4.63%
	*13— 4.99%	13— 4.4%	5.0%	15— 3.25%	3.29%
	11— 4.44%	9— 3.1%	3.7%	17— 2.34%	2.85%
	9— 4.16%	7— 2.0%	2.4%	13— 2.32%	2.75%
	* 7— 2.36%	8— 2.0%	2.3%	18— 1.31%	1.41%
	8— 2.12%	10— .5%	.6%	16— 0.45%	0.47%
	*10— 0.64%	6— .5%	.5%	20— 0.23%	0.31%
	* 6— 0.49%				

[1] Black percentage of total population

[2] Black Voting Age Population

* Meets Population Requirements

	1981 Democrat Plan	7D Plan		1991 Majority	
	28-35 Franklin	19-26 Franklin		21-29 Franklin	
(Beatty)	31—46.80%	21—41.6%	46.2%	21—50.30%	55.92%
(Miller)	*29—38.50%	19—34.8%	38.5%	22—44.31%	48.29%
	*32—26.60%	22—25.1%	26.6%	26— 8.07%	8.66%
	30—12.40%	20— 9.9%	11.2%	25— 7.96%	8.41%
	28— 5.90%	26— 5.5%	6.2%	23— 7.78%	8.32%
	34— 5.10%	24— 4.5%	4.8%	29— 4.47%	4.32%
	33— 4.10%	23— 3.6%	4.3%	24— 3.92%	4.22%
	35— 1.40%	25— 2.2%	2.3%	28— 3.56%	3.75%
				27— 3.09%	3.57%
	20-27 Hamilton	27-34 Hamilton		30-37 Hamilton	
(Rankin)	25—53.20%	28—57.6%	60.9%	30—56.83%	61.07%
(Mallory)	23—45.90%	33—40.7%	47.1%	31—52.60%	59.82%
	24—32.30%	34—22.9%	26.4%	32—21.58%	24.00%
	22—12.60%	31—10.5%	13.7%	35— 7.91%	8.96%
	27—12.20%	32—11.2%	12.6%	33— 7.50%	8.04%
	20— 8.90%	27— 3.2%	3.6%	36— 4.08%	4.49%
	21— 7.50%	30— 2.3%	2.7%	37— 1.94%	2.14%
	26— 2.70%	29— 2.3%	2.5%	34— 1.90%	2.14%

	36-40 Montgomery	35-39 Montgomery		38-43 Montgomery	
(McLin)	36—42.10%	36—41.2%	43.7%	38—50.70%	54.78%
(Roberts)	*37—36.10%	37—36.0%	40.4%	39—29.23%	32.35%
	40— 6.20%	39— 3.6%	4.7%	43— 3.61%	3.86%
	*39— 4.70%	35— 2.0%	2.5%	40— 2.84%	3.30%
	38— 0.91%	38— .8%	.9%	42— 2.28%	2.76%
				41— 1.18%	1.31%
	41-44 Summit	40-43 Summit		44-48 Summit	
(Sykes)	*42—35.40%	42—31.7%	35.2%	44—39.52%	43.26%
	*44— 9.00%	40— 8.1%	9.0%	45— 5.40%	6.29%
	*43— 2.90%	43— 2.5%	2.9%	47— 5.00%	6.00%
	*41— 2.30%	41— 2.0%	2.3%	46— 1.12%	1.33%
				48— 0.61%	0.53%
	45-48 Lucas	44-47 Lucas		49-52 Lucas	
(Jones)	*45—41.70%	45—37.4%	41.70%	49—47.65%	50.92%
	47—13.20%	47—10.4%	12.3%	52— 4.85%	5.65%
	*46— 5.30%	46— 4.4%	5.3%	50— 4.23%	5.46%
	48— 2.80%	44— 2.6%	2.8%	51— 2.18%	2.40%

1981 Democrat Plan	7D Plan		1991 Majority Plan	
49-51 Stark	49-51 Stark		54-57 Stark	
50—14.90%	50—12.4%	14.4%	54—12.93%	15.15%
49— 4.43%	51— 5.1%	5.5%	55— 3.39%	3.84%
51— 1.30%	49— 3.4%	3.8%	57— 2.64%	2.98%
			56— 1.15%	1.20%
52-53 Mahoning			64-65 Mahoning	
53—27.80%			64—31.19%	35.53%
52—10.50%			65— 1.48%	1.64%
Total (Minority—Majorilty (Over 50%))				
4	5	9		

260. As can be seen, the "7(D)" plan reflects only five (5) majority-minority districts, compared to four (4) in the 1981 plan and eight (8) in the 1991 Apportionment Plan. The 7(D) plan fragments minority voters in various counties. In Franklin County, H.D. 21 contains only 41.6% Black VAP and H.D. 19 contains only 34.8% Black VAP. In Hamilton County, the plan increases Black VAP in the district (prior H.D. 25, Representative Rankin's District) while H.D. 33 has a Black VAP of only 40.7%. In Montgomery County, H.D. 36 has a Black VAP of only 41.2%, compared to 50.70% in the 1991 Apportionment Plan. In Summit County, H.D. 42 has a Black VAP of only 31.7%, seriously threatening the ability to elect a candidate of choice in H.D. 42 (Sykes district).

261. Mr. Dykes testified at the February 18, 1992 hearing that he was not an expert in the Voting Rights Act and, more importantly, conducted no analysis of totality of circumstances. There was no rationale given and no evidence offered to justify the relative black populations in any minority districts. There was no evidence submitted that minorities voting influence would not be diluted under this plan.

262. Further, the "7(D)" plan splits Trumbull County in an impermissible fashion under the Ohio Constitution and violates the provisions of Article XI, Section 10(c).

CONCLUSIONS

I. VOTING RIGHTS ACT/FIFTEENTH AMENDMENT

1. The evidence establishes that the 1991 Apportionment Plan was fully endorsed by the Ohio Conference of Branches of the NAACP and was endorsed by Cuyahoga County by BEDO, BEDCO, Dr. Brisker. Plaintiffs' own minority consultant, and Congressman Stokes of the 21st Congressional Caucus. Minority districts created under the 1991 Apportionment Plan were created as the result

of extensive discussions with BEDO representatives, with extensive input from minority interest groups and representatives collected during fifteen (15) public hearings throughout the State, and with the direct input and endorsement of the NAACP. The record is replete with testimony regarding the good faith efforts of James R. Tilling to gain the maximum input possible from the minority community in adopting the 1991 Apportionment Plan.

2. The evidence establishes that the vast majority of districts in major urban areas in Ohio had to be reconfigurated solely because population changes within the districts caused the population of the existing districts to fail to comply with the requirements of Article XI, Section 3 of the Ohio Constitution. As indicated in Defendants' Exhibit 58, nine (9) out of fourteen (14) districts in Cuyahoga County, seven (7) out of eight (8) districts in Hamilton County, six (6) out of eight (8) districts in Franklin County, three (3) out of five (5) districts in Montgomery County and two (2) out of four (4) districts in Lucas County had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution.

3. The evidence indicates that districts in all major urban areas were reconfigured in the 1991 Apportionment Plan due to the population requirements of Article XI, Section 3 of the Ohio Constitution and in such a way as to avoid minority vote dilution. The 1991 Apportionment Plan reflects eight (8) minority-majority districts, twice the number in the 1981 plan.

4. There is no relative reduction in the number of districts over 10% black voting age population. In the 1991 Apportionment Plan, there are twenty (20) such districts, precisely the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter (and the BEDO plan).

5. There is no dilution of minority voting strength in the districts currently represented by minority incum-

bents. All eleven (11) house districts remain strongly Democratic districts.

6. Consideration of the "totality of circumstances" factors further support the reasonableness of the minority districts created in the 1991 Apportionment Plan.

a) There is a history of official discrimination in the state and political subdivisions at issue that touched the rights of minorities to fairly participate in the democratic process;

b) There exists significant racial bloc voting throughout Ohio;

c) Barriers exist to prevent minorities from fully participating in Democratic primaries in Ohio. These barriers include campaign financing, party support and the screening process;

d) The effects of discrimination continue to exist in housing, in education, and in employment;

e) Political campaigns in Ohio have been characterized by overt or subtle racial appeal; and

f) While minorities have been elected to house seats in Ohio, no black has ever been elected to statewide office and new black candidates face barriers to election. The minority incumbents elected have been elected from predominately minority districts or have advantages of incumbency or family name recognition. In Ohio, no minority is currently elected from a district with less than 35% black population.

7. Minority populations in all major urban counties are geographically compact, contiguous and politically cohesive and do not reflect unreasonable gerrymandering.

8. The districts created in the 1991 Apportionment Plan, except for House District 68 and Senate District 32, meet the population requirements of Article XI, Sections 3 and 4 of the Ohio Constitution. All districts meet accept-

able population requirements under the Ohio Constitution and federal law. See *Voinovich v. Ferguson* (1992), —— Ohio St. 3d ——.

9. It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.

III. EQUAL PROTECTION/FOURTEENTH AMENDMENT

10. The evidence establishes that the 1991 Apportionment Plan reflects no partisan bias. The 1991 Apportionment Plan and the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter reflect a difference of only (4) seats statewide. The seats/vote curve analysis performed by Defendants' expert, Dr. Gary King, establishes that there is no statistically significant partisan bias in the 1991 Apportionment Plan either in the Ohio House or the Ohio Senate.

IV. OHIO CONSTITUTIONAL ISSUES

11. The 1991 Apportionment Plan, as amended, is in compliance with Article XI of the Ohio Constitution. *Voinovich v. Ferguson* (1992), —— Ohio St. 3d ——.

V. ALTERNATIVE PLANS

12. The 1991 Apportionment Plan as amended (Amendment D), as does the 1991 Apportionment Plan, complies in all respects with applicable state and federal law and results in no minority vote dilution based on the totality of circumstances.

13. Amendment E to the 1991 Apportionment, which retains relative black populations similar to the 1981

plan, reflects a risk of minority vote dilution based on an analysis of totality of circumstances.

14. Amendment F reflects five (5) majority-minority districts in Cuyahoga County, with Black VAP's from 61.7% to 53.7%. This plan was originally introduced by the NAACP and endorsed by the majority members of the Board.

15. The "7(D)" plan proposed by Messrs. Ferguson and Quilter was not supported by any evidence relating to totality of circumstances and, therefore, is not responsive to the mandate of the *Quilter* Court. There was no evidence to justify the relative black populations in any minority district. There was no evidence submitted that minority voting influence would not be diluted under the plan. The plan further violates the Ohio Constitution as provided above.

The above Findings and Conclusions are hereby adopted by the persons responsible for apportionment pursuant to Article XI of the Ohio Constitution.

Dated: February 18, 1992

/s/ George Voinovich
GEORGE VOINOVICH
Governor of the State of Ohio

/s/ Robert Taft, II
ROBERT TAFT, II
Secretary of State of Ohio

/s/ Stanley J. Aronoff
STANLEY J. ARONOFF
President of the Ohio Senate

THOMAS FERGUSON
Auditor of the State of Ohio

BARNEY QUILTER
House Representative

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or

given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870], UNITED STATES CONSTITUTION

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an

action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any state-wide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any ac-

tion of a single judge may be reviewed by the full court at any time before final judgment.

42 U.S.C. § 1973

SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973c

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a)

based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such quali-

fication, prerequisite, standard, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

OHIO CONSTITUTION ARTICLE XI: APPORTIONMENT

§ 1 [Persons responsible for apportionment of state for members of general assembly.]

The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is

made, in such manner as provided by law. (Enacted Nov. 7, 1967. Former § 1 repealed, see SJR 24, 107th General Assembly.)

§ 2 [Method of apportionment of state for members of general assembly.]

The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment. (Enacted Nov. 7, 1967. Former § 2 repealed, see SJR 24, 107th General Assembly.)

§ 3 [Population of each house of representatives district.]

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article. (Enacted Nov. 7, 1967. Former § 3 repealed, see SJR 24, 107th General Assembly.)

§ 4 [Population of each senate district.]

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article. (As enacted Nov. 7, 1967. Former § 4 repealed, see SJR 24, 107th General Assembly).

§ 5 [Representation.]

Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly. (As enacted Nov. 7, 1967. Former § 5 repealed, see SJR 24, 107th General Assembly.)

§ 6 [Creation of district boundaries; change at end of decennial period.]

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed. (As enacted Nov. 7, 1967. Former § 6 repealed, see SJR 24, 107th General Assembly.)

§ 7 [Boundary lines of house of representatives districts.]

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the

boundary of each district shall be a single non-intersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article. (As enacted Nov. 7, 1967. Former § 7 repealed, see SJR 24, 107th General Assembly.)

§ 8 [Determination of number of house of representatives districts within each county.]

A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of

the county by the ratio of representation for the house of representatives determined under section 2 of this Article. (As enacted Nov. 7, 1967. Former § 8 repealed, see SJR 24, 107th General Assembly.)

§ 9 [When population of county is fraction of ratio of representation.]

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county. (As enacted Nov. 7, 1967. Former § 9 repealed, see SJR 24, 107th General Assembly.)

§ 10 [Creation and numbering of house of representative districts.]

The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining terri-

tory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts. (As enacted Nov. 7, 1967. Former § 10 repealed, see SJR 24, 107th General Assembly.)

§ 11 [Senate districts.]

Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article. (As enacted Nov. 7, 1967. Former § 11 repealed, see SJR 24, 107th General Assembly.)

§ 12 [Change in boundaries of senate districts.]

At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district

which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 12 repealed May 7, 1968, HJR 42.)

§ 13 [Jurisdiction of supreme court, effect of determination of unconstitutionality; apportionment.]

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any action of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 13 repealed May 7, 1968, HJR 42.)

§ 14 [District boundaries until January 1, 1973.]

The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

§ 15 [Severability provision.]

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

APPENDIX J

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL

C8-91-985

PATRICIA COTLOW, PHILLIP KRASS, SHARON LACOMB, JAMES STEIN, and THEODORE SUSS, individually and on behalf of all Citizens of Minnesota similarly situated,

Plaintiffs,

and

JOHN WALKER, HOWARD MILLER, DON SUDOR, and NKAJLO VANGH,

Plaintiff-Intervenors,

vs.

JOAN GROWE, Secretary of State of Minnesota; and PATRICK H. O'CONNOR, Hennepin County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants,

and

THE SEVENTY-SEVENTH MINNESOTA STATE HOUSE OF REPRESENTATIVES and the SEVENTY-SEVENTH MINNESOTA STATE SENATE,

Defendant-Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER FOR JUDGMENT ON LEGISLATIVE REDISTRICTING

[Filed Nov. 21, 1991]

The Special Redistricting Panel convened hearings on July 26, August 29, September 24, October 16, and November 14, 1991.

Plaintiffs were represented by Alan W. Weinblatt, Weinblatt & Davis; plaintiff-intervenors were represented by Bruce D. Willis, Popham, Haik, Schnobrich & Kaufman, Ltd.; defendant Joan Growe, Secretary of State, was represented by John R. Tunheim, Chief Deputy Attorney General, and Jocelyn Olson, Assistant Attorney General; defendant Patrick H. O'Connor, Hennepin County Auditor, was represented by Michael O. Freeman, Hennepin County Attorney, and Toni A. Beitz, Senior Assistant Hennepin County Attorney; and defendant-intervenors were represented by John D. French and Michael L. Cheever, Faegre & Benson, and Peter S. Wattson, Senate Counsel.

All parties were directed to file legislative redistricting plans on October 7, 1991. The panel convened hearings on October 16 and November 14, 1991 for comments on the plans.

Based on the record received from the Minnesota District Court, Fourth Judicial District; the record compiled during the course of the hearings; and the submissions of the parties; the panel makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In January 1991, Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss initiated this action in Minnesota District Court, Fourth Judicial District. They asked the court to declare the present

legislative apportionment, Minn. Stat. §§ 2.019, 2.042 through 2.702 (1990), and the present congressional apportionment, outlined in *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982), invalid under the Minnesota and United States Constitutions.

2. The plaintiffs further requested the court to retain jurisdiction during the 1991 session of the legislature to determine whether any legislatively enacted plans for redistricting satisfied the Minnesota and United States Constitutions and the Federal Voting Rights Act. In the absence of the enactment of a constitutionally valid method of apporitonment by the legislature, the plaintiffs asked this court to make a determination of a proper legislative and congressional apportionment system for the State of Minnesota.

3. On February 15, 1991, John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh served notice and statement of intervention. On March 14, 1991, plaintiffs served notice of objection to the intervention.

4. On February 25, 1991, the previously named plaintiffs and defendants Joan Growe and the Hennepin County Auditor stipulated that the court had subject matter jurisdiction; that as a result of population changes reflected in the 1990 federal census, the present legislative and congressional districts contravene the Minnesota and United States Constitutions; and authorized the Chief Judge of the Hennepin County District Court to request the Chief Justice of the State of Minnesota to appoint a panel of three district court or appellate judges to hear and decide this action.

5. On April 2, 1991, the Minnesota House of Representatives and the Minnesota Senate served notice of intervention as defendants and a statement of intervention. No party objected.

6. On May 18, 1991, the legislature passed Chapter 246, S.F. No. 1571, establishing a legislative redistricting

plan. The bill was presented to the governor on May 24, 1991.

7. On June 4, 1991, the Minnesota Supreme Court appointed the undersigned three-judge panel to hear and decide all matters, including all pretrial and trial motions, and to reach an ultimate disposition of this case.

8. On June 20, 1991, the Minnesota Supreme Court declined original jurisdiction on the question of the validity of the enactment of a number of bills, including Chapter 246, the legislative redistricting bill. A declaratory judgment action was filed in Ramsey County District Court.

9. On July 26, 1991, the special redistricting panel conducted a pretrial status conference and, on July 29, 1991, issued Pretrial Order No. 1 ordering (a) that John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh be permitted to intervene as plaintiff-intervenors; (b) that parties submit responses to the criteria adopted by the Minnesota Legislature for legislative and congressional redistricting plans; and (c) that arrangements be made to permit the panel to view the legislature's redistricting computer system.

10. On August 2, 1991, by order of Ramsey County District Court, Chapter 246 was declared to be a validly enacted law.

11. On August 16, 1991, the special redistricting panel issued Pretrial Order No. 2 establishing certain preliminary criteria for legislative and congressional redistricting and directing oral argument on other reserved criteria.

12. After the parties' arguments on the reserved criteria, the panel issued Pretrial Order No. 3 on September 13, 1991, adopting the final criteria for congressional and legislative redistricting. The criteria for legislative redistricting are as follows:

1. The Senate must be composed of 67 members. The House of Representatives must be composed of 134 members.

2. Each district is entitled to elect a single member.

3. A representative district may not be divided in the formation of a Senate district.

4. The districts must be substantially equal in population. The population of a district must not deviate from the ideal by more than two percent. Because a court-ordered reapportionment plan must conform to a higher standard of population equality than a legislative reapportionment plan, *de minimis* deviation from the population norm will be the goal for establishing districts. *See Chapman*, 420 U.S. 1, 95 S. Ct. 751; *Connor*, 431 U.S. 407, 97 S. Ct. 1828.

5. The districts must be composed of convenient contiguous territory structured into compact units. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.

6. The districts must be numbered in a regular series, beginning with House district 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then in Minneapolis and St. Paul.

7. The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a racial or language minority makes it possible, the districts must increase the probability that members of the minority will be elected. Any plan adopted by the court shall comply with the applicable provisions of the Federal Voting Rights Act, 42 U.S.C. § 1971, *et seq.*

8. The districts will be drawn with attention to county, city and township boundaries. A county, city, or township will not be divided into more than one district except as necessary to meet equal population requirements or to form districts that are composed of convenient, contiguous and compact territory. When any county, city or township must be divided into one or more districts, it will be divided into as few districts as practicable. *Reynolds v. Sims*, 377 U.S. 533, 578-79, 84 S. Ct. 1362, 1390-91 (1964); *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572 (1967).

9. The districts should attempt to preserve communities of interest when that can be done in compliance with the preceding standards. The panel may recognize a community's character as urban, suburban or rural. *See Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971); *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982); *LaComb v. Growe*, 541 F. Supp. 160 (D. Minn. 1982); *Maryland Citizens Comm. for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), *aff'd sub. nom. Alton v. Tawes*, 384 U.S. 315, 86 S. Ct. 1590 (1966). Additional communities of interest shall be considered if persuasively established and not in violation of applicable case law.

10. Past voting behavior and residency of incumbents shall not be used as criteria; however, they may be used to evaluate the fairness of plans submitted to the court.

13. Subsequently, the panel adopted an additional criterion that all submitted plans should be based on Chapter 246. Defendant-intervenors, joined by other parties, urged the panel to adopt, as a criterion, certain "curative amendments" to Chapter 246. The amendments had passed out of the special redistricting committees of both houses on August 26, 1991, after the legislature had adjourned.

However, the amendments had not been passed by the full bodies of either house, nor had they been presented to the governor for his signature. The panel declined to adopt as a criterion the legislative committees' proposed corrections to Chapter 246.

14. The August 29, 1991 Pretrial Order No. 3 also ordered suspension, until further order of the panel, of the time periods within which local units of government are required to complete the redefining of the boundaries of election precincts, wards, or other local election districts pursuant to Minn. Stat. Ann. §§ 204B.135, 204B.14, 205.84, 205A.12, and 375.02 (West Supp. 1991). The pretrial order designated the format for submission of redistricting plans and directed oral argument on various motions, including whether Chapter 246 violates the Minnesota or United States Constitutions or the Federal Voting Rights Act. Finally, recognizing that the time requirements for congressional redistricting are less stringent, the panel deferred submission of congressional redistricting plans.

15. Following submissions from the parties, the panel issued Pretrial Order No. 4, on October 1, 1991, which (a) denied plaintiff-intervenors' motion to stay this proceeding; (b) declared that the numerous facial infirmities in Chapter 246, including noncontiguous districts, violate Article IV, sections 2 and 3 of the Minnesota Constitution; and (c) declared that facial infirmities also violate the equality of representation requirement of the fourteenth amendment to the United States Constitution. The panel denied plaintiff's motion to enforce Chapter 246, together with its "curative amendments", as the reapportionment plan for the State of Minnesota. Because no party submitted specific allegations of Voting Rights Act violations, the panel ordered submission of any Chapter 246 violations of the Federal Voting Rights Act without waiver of jurisdictional objections by October 7, 1991.

16. On October 7, 1991, defendant-intervenors the Minnesota Legislature renewed its submission of Chapter 246 together with the curative amendments adopted by the Senate and House Committees on Redistricting; plaintiffs proposed adoption of the legislature's plan, with curative amendments, as the court-ordered legislative redistricting plan; defendant Secretary of State Growe supported the submission of the legislature; defendant Hennepin County Auditor supported the submission of the legislature; plaintiff-intervenors submitted a proposed legislative redistricting plan. The panel received additional submissions, not part of the record, from citizens groups and individual legislators.

17. No violations of the Federal Voting Rights Act were asserted.

18. On October 15, 1991, defendant-intervenors the Minnesota Legislature submitted a written response to the plaintiff-intervenors' proposed legislative redistricting plan. On October 16 (a) defendant Growe submitted a written response to plaintiff-intervenors' proposed legislative redistricting plan; (b) plaintiff-intervenors submitted a written response to the legislature's redistricting plan; and (c) defendant Hennepin County Auditor submitted a written analysis of the plaintiff-intervenors' plan. On October 17 and 18, 1991, defendant-intervenor the Minnesota Legislature submitted additional responses to the plaintiff-intervenors' redistricting plan.

19. On November 4, 1991, defendant-intervenor the Minnesota Legislature submitted a congressional redistricting plan. The plan is based on S.F. No. 1597/H.F. No. 1728, adopted by the House of Representatives Committee on Redistricting and the Senate Committee on Redistricting on October 30, and 31, 1991, and referred to the full House and Senate for consideration in early January, 1992.

20. On November 8, 1991, the panel issued Pretrial Order No. 5 ordering final oral argument on (a) the existence and use of any legislative history of Chapter 246, including maps, and (b) the application of the rules of statutory interpretation to avoid, modify, or correct constitutional or other defects in Chapter 246. In addition, the panel ordered that all parties have computer access to each proposed plan file and written geographic description of both plans.

21. On November 14, 1991, defendant-intervenors the Minnesota Legislature submitted a memorandum on Chapter 246's legislative history, appending affidavits of State Representative Peter Rodosovich, State Senator Lawrence J. Pogemiller, and Craig Lindeke from the Revisor of Statutes Office. The panel has adopted the following as relevant pieces of legislative history:

a. A set of two small black and white maps, one of the state and one of the metropolitan area. These maps were distributed to each member of the House in the House chamber on May 18, 1991, before the members voted on Chapter 246. These two maps were also distributed to each member of the Senate in the Senate chambers on May 16, 1991, before the members voted on Chapter 246. In each instance, the chief authors of the bill represented that the proposed redistricting plan was depicted in the two black and white maps.

b. A second map group consisting of four large color maps depicting respectively the areas of (1) the State of Minnesota, (2) the seven-county metropolitan area, (3) the City of Minneapolis, and (4) the City of St. Paul. The maps were used in both the House and Senate commitees and displayed in the House retiring room on May 17, 1991, the House chamber on May 18, 1991, the Senate retiring room on May 16, 1991, and in the Senate chamber on May 16, 1991.

c. A group of seven reports, primarily population tables. Three of the reports were distributed to members of the House on May 18, 1991, before they voted on Chapter 246. Three of the reports were distributed to all members of the Senate on May 18, 1991, before they voted on Chapter 246. The remaining report was distributed to the members of the Senate Redistricting Committee on May 3, 1991.

CONCLUSIONS OF LAW

1. Minnesota Laws 1991, Chapter 246, violates Article IV, sections 2 and 3 of the Minnesota Constitution because, among other defects, it creates noncontiguous districts.

2. Minnesota Laws 1991, Chapter 246 violates the equality of representation requirement of the fourteenth amendment of the United States Constitution.

3. Unless a legislative plan is incorrectably invalid, a court may not simply substitute its own reapportionment preferences for those of the state legislature. *See Upham v. Seamon*, 456 U.S. 37, 40-42, 102 S. Ct. 1518, 1520-21 (1982). Courts are not permitted to disregard state apportionment policy or plans without solid constitutionol grounds for doing so. *White v. Weiser*, 412 U.S. 783, 795, 93 S. Ct. 2348, 2355 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160, 91 S. Ct. 1858, 1878 1971)). The court must reconcile constitutional requirements with the goals of state political policy by limiting its modifications "to those necessary to cure any constitutional or statutory defect." *Upham* 456 at 43, 102 S. Ct. at 1522; *see also Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (making only those corrections necessary to remove unconstitutional defects). Such deference does not extend to the curative amendments, as they have not been adopted into law.

4. Most of the constitutional and statutory defects in Minnesota Laws 1991, Chapter 246 can be cured by ascertaining and effectuating the legislative intent *see* Minn. Stat. § 645.16 (1990); and by applying canons of statutory construction, Minn. Stat. §§ 645.16 through 645.43 (1990). The remaining defects require corrections and adjustments which are based on legislative policy and the adopted legislative redistricting criteria. These corrections and adjustments are made in the attached plan and explained in the annotations that will accompany the final redistricting order.

5. Minnesota Laws 1991, Chapter 246 contains no Federal Voting Rights Act violation.

BASED ON THE ENTIRE RECORD,
IT IS HEREBY ORDERED:

1. That the following reapportionment of the Minnesota Legislature, subject to amendments after the final December 3, 1991 hearing, shall be effective for the 1992 primary and general elections unless a constitutional plan is enacted by the State of Minnesota before January 21, 1992.

2. Elections conducted after January 1, 1993 shall be according to this plan or any constitutional plan adopted after this date by the State of Minnesota.

3. Submission of plans for congressional redistricting is deferred until further order of this court.

4. Subject to reconsideration following December 3 oral arguments, the stay of time periods for completion of redistricting for local units of government is dissolved on the date of the final order.

5. The panel retains jurisdiction over this matter to ensure that any bill enacted into law complies with the

Minnesota and United States Constitutions and the Federal Voting Rights Act.

Dated: November 21, 1991

BY THE COURT:

/s/ Harriet Lansing
HONORABLE HARRIET LANSING

/s/ Kenneth J. Maas
HONORABLE KENNETH J. MAAS

/s/ William E. Walker
HONORABLE WILLIAM E. WALKER

Memorandum

The Minnesota Constitution places the power and responsibility of redistricting with the legislature and the governor. Minn. Const., art. IV, §§ 3, 24. In the last 78 years, however, Minnesota's redistricting rule has become its exception. Only once during this time have the legislature and the governor been able to pass a redistricting plan. Consequently, the redistricting courts have been compelled to assume a more legislative role to adjust for the detrimental lack of a "current expression of the state's political preferences regarding the complicated redistricting process." *LaComb v. Growe*, 541 F. Supp. 145, 150-51 (D. Minn. 1982).

Following the 1990 federal census, the 1991 Minnesota House and Senate were able to pass Chapter 246, S.F. No. 1569, prescribing the boundaries of Minnesota's legislative districts. This bill was subsequently determined to be validly enacted law. The United States Supreme Court has consistently declared that when a state had enacted a redistricting plan, courts may not pre-empt the redistricting responsibility or intrude on state policy unless necessary to correct an unconstitutional plan.

A court's first responsibility is to determine whether any errors in an enacted plan are so pervasive as to invalidate it entirely, requiring adoption of an alternate plan. If the plan is not incorrectly invalid, the court must ascertain the nature and scope of each error and modify the legislative plan to the extent necessary to correct such defects.

Our detailed analysis of Chapter 246 demonstrates that there are numerous errors in Chapter 246 as enacted. The legislature's curative amendments propose approximately 160 changes in 65 pages of text. Some of the proposed amendments clarify wording and are only refinements in language which are not necessary to discern the boundaries of districts. Other proposed changes, however, point to substantive errors requiring changes to correct defects in the statute.

In addressing the needed substantive changes, some corrections are obvious, and there is no need to employ the rules of statutory construction or to refer to legislative history. In other instances, the errors can be rectified by reference to the context of the language, the geographic context of the district or by referring to the maps or tables which form part of the legislative history. In the remaining instances where corrections and adjustments are required and legislative intent does not provide direction, we have drawn the boundaries by attempting to preserve surrounding constitutional boundaries, and by examining the submissions of the parties and weighing these and other alternatives against our adopted criteria. In no instance have we found the problems to be so incorrectable that the basic plan must be abandoned.

Plaintiff-intervenors have urged acceptance of a substantially different plan with better numerical balance. We recognize that the primary objective of redistricting is to achieve population equality in all state districts. Courts have, however, uniformly recognized that population deviations of ten percent or less in legislative plans do not affect the plan's constitutionality. The limited population deviations in the corrected Chapter 246 are in almost all instances well within the stated two percent goal. To accept an alternative plan with slightly lower population deviations over an enacted legislative plan would require us to disregard an entire body of established redistricting case law.

Plaintiffs have requested that we also establish boundaries for congressional districts. Although we have established criteria for a congressional redistricting plan, we have deferred action until the legislature and the governor have an opportunity to enact a constitutional plan. One plan has been reported out of the committees and the legislature is scheduled to meet from January 6 through January 17, 1992, to consider the issue.

The reasons to proceed in reviewing the legislative redistricting plan have been fully addressed in our preceding orders. In keeping with the parties' requests, we are attempting to have final reapportionment in place in advance of the February precinct caucuses and to provide some certainty to local units of government who are anxious to begin their own redistricting process. We accept the principle established in *Scott v. Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 1527 (1965), that state courts have a primary obligation to review redistricting issues. By proceeding as swiftly as possible, we intend to provide any time necessary for an orderly appeal process and to avoid any duplicative litigation in the federal courts. Finally, our extended analysis of Chapter 246 has left us with an enduring realization that drawing accurate and verifiable legislative boundaries for Minnesota's 201 districts is a complex and time consuming operation. In the interest of specificity and exactness, we want to provide sufficient time to examine and exclude any technical errors. Permitting the parties to examine the preliminary legislative redistricting and identify any errors before the final December 3, 1991 hearing and adoption should aid in this process.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-91-CA-425
Civil No. A-91-CA-426
Civil No. A-91-CA-428

LOUIS TERRAZAS, *et al.*

vs.

BOB SLAGLE, *et al.*

SUMMARY OPINION AND JUDGMENT

[Filed Dec. 24, 1991]

Before the Court is plaintiffs' motion for implementation of interim plan filed in case number A-91-CA-425 on November 14, 1991; plaintiffs' request for implementation of interim plan filed in case number A-91-CA-426 on November 27, 1991; Intervenor Simms and Lucio's request for implementation of interim plan filed in case number A-91-CA-426 November 27, 1991; Intervenor Sibley's request for interim relief filed in case number A-91-CA-426 November 27, 1991; and plaintiffs' request for implementation of interim plan and consolidation hearing filed in case number A-91-CA-428 on November 27, 1991. On December 10 ,1991 this Court began a nearly four-day hearing on these various motions at which time the argument of counsel, testimony of witnesses, and other evidence was offered into the

record. Upon review of the motions, the responses filed, the file of this case, and the evidence and argument presented at the hearing the Court is of the following opinion.

I. BACKGROUND

Rarely has the procedural background of a case been more convoluted or important than in the instant causes dealing with redistricting in Texas following the 1990 Decennial Census. On February 7, 1991 various individual Hispanic voters (*Mena* plaintiffs) filed suit in Hidalgo County District Court, 332nd Judicial District of Texas, challenging the figures published in the 1990 Decennial Census on the grounds that said figures grossly underrepresented the number of Mexican-Americans and African-Americans in Texas. This census undercount, the argument continued, could potentially operate to deprive these minority groups of their voting rights under article I, sections 3, 3a, 19 and 29 of the Texas Constitution. A census undercount case was also filed by the *Mena* plaintiffs in the United States District Court for the Southern District of Texas, later amended to include redistricting challenges. No significant action has taken place in the Southern District case, nor was a three-judge panel ever impaneled there. While the state lawsuit was underway, the Legislature reapportioned state senatorial and representative districts using the 1990 census without adjusting for any undercount. The Legislature later reapportioned congressional districts in House Bill 1 ("HB 1") also using unadjusted census figures. All three plans were submitted to the Justice Department for preclearance as required by Sec. 5 of the Voting Rights Act.

Meanwhile, on May 23, 1991 plaintiffs Terrazas, Angelo, and Craddick ("Republican plaintiff") filed three separate lawsuits invoking this Court's jurisdiction under the Voting Rights Act and Fourteenth and Fifteenth Amendments challenging the reapportionment scheme

adopted by the State Legislature for the Texas House of Representatives, Texas Senate, and United States Congress in case numbers 425, 426, and 428 respectively. A three-judge panel was convened in these cases on June 24, 1991. After the Republican plaintiffs filed their instant lawsuits, the *Mena* plaintiffs amended their state pleadings to challenge the validity of House Bill 150 ("HB 150)), (House), and Senate Bill 31 ("SB 31"), (Senate), to require that legislative districts be redrawn using adjusted population figures. The same various state officials (the "state defendants"), among others, were named as defendants in both state and federal cases. There were now both state and federal lawsuits running parallel attacks on the 1990 redistricting statutes passed by the Texas Legislature. As evidenced by the record in this case, these "parallel" suits would cross, intertwine, and tangle to the point that the next round of primary elections in Texas may not occur as scheduled without action by this Court.

It was the state case that first caused this Court to review the substance of the Republican plaintiffs' Complaints. On July 29, 1991 the State Defendants filed a motion to stay state court proceedings, requesting this Court stay the Hidalgo County proceedings, arguing that a state court order requiring the State of Texas to use population numbers other than those reported in the 1990 Decennial Census could place the state defendants in the quandary of having to comply with a state court order that could eventually be found in contravention of federal constitutional principles by this Court. In the interest of avoiding such a state and federal constitutional conflict, the argument continued, a stay of state proceedings was warranted. Finding the defendants' posture did not entitle them to injunctive relief, this Court denied the motion by Order entered August 2, 1991. On August 5, 1991, the state court commenced hearing on the *Mena* plaintiffs' application for temporary injunction and partial summary judgment, with the state defendants, rep-

resented by the Attorney General, defending the validity of the reapportionment statutes passed by the Legislature.

On August 22, 1991 the state court granted plaintiffs' requested relief, declared the 1990 Decennial Census undercounted minority populations in Texas, and ordered the state to submit new plans using adjusted figures by September 30, 1991. The state promptly filed an appeal with the Texas Supreme Court, requesting a stay of the trial court proceedings pending the appeal. The Supreme Court granted the stay on September 24, 1991.

While the Attorney General had filed an appeal, he was actively working with the *Mena* plaintiffs in an attempt to resolve their differences with respect to the Texas Senate. By October 7, 1991, nineteen of the state's thirty one senators unofficially approved an agreement settling the dispute with the *Mena* plaintiffs regarding the Texas Senate. Because the stay of the *Mena* proceedings remained in effect, plaintiffs filed a new lawsuit in Hidalgo County styled *Quiroz v. Richards*, and entered an agreed judgment in that case memorializing the senate settlement—all on the 7th of October, 1991. Part of that Judgment ordered that elections for the state Senate be held under the alternate districting plan agreed to by the parties in *Quiroz*. As a result, the Texas Secretary of State notified the Department of Justice ("DOJ") that SB 31, even though it had been passed by both houses of the State Legislature, would be withdrawn from consideration for preclearance, and that the *Quiroz* Senate plan would be promptly substituted in its place. SB 31 had been before the DOJ for 59 days when the Secretary of State removed it from consideration.[1] The DOJ granted preclearance approval of the *Quiroz* plan on November 18, 1991. Though they had been defenders of SB 31 throughout the trial proceedings, as far as the

[1] Sec. 1973c requires the DOJ to grant preclearance or issue its objections within 60 days of submission of the proposed voting change.

State Defendants were concerned the *Quiroz* plan was now the law under which elections would take place for the Texas Senate.

As the procedural shenanigans continued to unfold in the state proceedings, this Court issued various scheduling orders commanding the parties in the instant causes to submit briefs and proposed interim plans for review in the event preclearance would not be obtained in time for the 1992 primary elections to proceed. On October 9, 1991 the Republican plaintiffs requested a temporary restraining order with this Court seeking to enjoin the State from substituting the *Quiroz* plan with the DOJ in place of SB 31, and further enjoin the state defendants from engaging in similar settlement activities that could result in HB 150 being replaced by another agreed plan.[2] A hearing on this motion was held October 23, 1991, and is maintained under advisement to date. The Republican plaintiffs also challenged the *Quiroz* plan in a mandamus action before the Texas Supreme Court. Though Republican plaintiffs had never intervened in either of the state cases, the Texas Supreme Court found they had standing to challenge the activities of the Attorney General and the rulings of the trial judge, and conditionally granted the writ in a plurality opinion delivered December 17, 1991. Finding the Attorney General did not exceed his authority in negotiating the *Quiroz* and *Mena* settlements, the Court did find that it was an abuse of the trial judge's discretion to accept the *Quiroz* plan without any adversary proceeding given the tremendous public impact of such a judgment. The effect of this opinion was to void the *Quiroz* plan, place the *Mena* settlement for the House into question, and return

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[2] The state parties have since reached a similar agreement with the Texas House plan, and have submitted their alernative plan to the DOJ for review. The DOJ had lodged objections to HB 150 by letter dated November 12, 1991, finding the plan passed by the Legislature diluted minority voting strength in several specific areas of the state. The Mena settlement for the Texas House purported to address concerns voiced by the DOJ.

the case to the trial court for a full hearing before entry of judgment.

This panel did not have the benefits of the views of the Texas Supreme Court when the parties in the instant cause came before it for hearing on what interim relief, if any, should be fashioned to ensure the 1992 primary elections proceed as scheduled under plans that pass muster under the Voting Rights Act and the U.S. Constitution. As it stands at the time of this Opinion, there are no legal plans reapportioning seats for election to the Texas House or Senate that have been precleared by the DOJ. Only HB 1, the plan passed by the Legislature in special session reapportioning seats to the United States Congress, has received preclearance and not been successfully challenged under state law. On December 20, 1991, the DOJ filed with this Court notice that it reserved formal comment on its views regarding SB 31 or whether the *Mena* settlement addressed its concerns with HB 150 until an unspecified date. Accordingly, this Court has reviewed HB 150, SB 31 and HB 1 in light of the Republican plaintiffs' claims, the concerns of parties *amicus* and Intervenors, the DOJ's objections to HB 150, and the requirements of the Voting Rights Act and Fourteenth and Fifteenth Amendments to the U.S. Constitution.

II. FEDERAL STANDARDS FOR REDISTRICTING

Title 42 United States Code Sections 1973 et seq. were originally enacted by Congress in the Voting Rights Act of 1965. An attempt to increase the protection afforded minority voters under the Fourteenth and Fifteenth Amendments, the Act was further strengthened by amendment of Sec. 1973 ("Sec. 2") in 1982 by establishing a totality of the circumstances effects test for minority vote dilution. This forgiving standard alleviates a plaintiff's burden of proving discriminatory intent as traditionally required to prove a violation of the Fourteenth and Fifteenth Amendments. *See City of Mobile, Alabama v. Bolden*, 446 U.S. 53, 70 (1980). Section 1973 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, as provided in subsection (b) of this section. (emphasis added)
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S. Sec. 1973 (West Supp. 1991).

This standard does not require that minority candidates be elected to public office in numbers equal to their percentage of voting age population. Rather, upon review of the totality of the circumstances, a plan redistricting legislative seats fails to satisfy the requirements of Sec. 2 if it: (1) dilutes the voting strength of a minority group populous and concentrated enough to constitute a voting majority in a single district by frustrating the electoral choices of the minority group due to the bloc voting of other voters in the district; or (2) the number of districts in which minority candidates may be

successfully elected are reduced due to disproportionally "packing" that minority group into select districts. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). Though *Gingles* dealt with vote dilution in the context of multi-member districts, courts in this Circuit have adopted the use of its test in single-member district litigation. *See e.g., Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *Ewing v. Monroe County, Mississippi*, 740 F. Supp. 417 (N.D. Miss. 1990). In *Brewer*, the Circuit held the standard in *Gingles* is essentially a threshold a plaintiff must cross before the Court reviews the propriety of a given plan under the totality of the circumstances test. *Brewer*, 876 F.2d at 450. *Gingles* also served to narrow the Court's review of the circumstances to focus on the extent minority groups have been able to elect candidates of their choice, and the extent to which voting is polarized. *Gingles*, 478 U.S. at 48, n. 15. There is ample evidence in the record, including the concession of counsel for the State that there is a strong history of polarized voting in Texas.

Plaintiffs have also alleged all three reapportionment plans passed by the Texas Legislature are replete with partisan gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Intervenor Sibley makes similar assertions, focusing particularly on one Senate district. In 1986, the United States Supreme Court in *Davis v. Bandemer*, 478 U.S. 109 (1986), held that partisan gerrymandering claims are justiciable, though it offered little hope that political plaintiffs might prevail on such claims. Under *Bandemer*, a plaintiff challenging a plan must show: the plan intentionally discriminates against a political group; the plan will have a long term disproportionate effect on that group's election of representatives; *and* the effect of the redistricting scheme as a whole consistently shuts out that group from the political process in that state. *Id.* at 141-143. This Court's analysis of the evolving law in this area falls

outside the scope of this opinion, and the evidence before it at the present time. The parties may have ample opportunity to make a more complete record during the trial on the merits, which the Court presumes will not take place until after the 1992 elections.

A brief recitation of the responsibilities of the DOJ is also in order at this point. Since 1975, Texas has fallen within the scope of Sec. 5 of the Voting Rights Act which requires that any changes in voting law in a covered state be precleared by the DOJ before they may be implemented. 42 U.S.C. Sec. 1973c (West 1981). A Sec. 5 review is primarily concerned with whether the proposed change causes a retrogression in minority voting strength, though DOJ guidelines currently require the plan to be scrutinized for noncompliance with Sec. 2 before preclearance may be obtained. *See City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983); *Beer v. United States*, 425 U.S. 130, 139-141 (1976); *and* 28 C.F.R. Sec. 51.54(a) (1991); 28 C.F.R. Sec. 51.55(b) (1991). The State also bears the burden of showing that the proposed voting change was not enacted with a discriminatory purpose. 28 C.F.R. Sec. 51.52 (1991).

Preclearance of a proposed plan does not bar a subsequent court proceeding brought under Sec. 2. 42 U.S.C. Sec. 1973c. Should this Court find that any of the plans fail to satisfy the federal requirements, it is within the ambit of this panel's discretion to draw remedial plans that may not otherwise comply strictly with the requirements for fashioning permanent remedies in order to ensure that elections proceed as scheduled. *See Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Burns v. Richardson*, 384 U.S. 73, 85-86 (1966). Any plan drawn by this Court is also exempt from the preclearance requirements of Sec. 5. *Connor v. Johnson*, 402 U.S. 690, 691-692 (1971).

II. REVIEW OF THE 1990 REAPPORTIONMENT PLANS

A. *United States Congress*

Republican plaintiffs challenge the following congressional districts drawn in HB 1: Districts 1, 2, 4, 5, 6, 8, 9, 13, 14, 17, 19, 21, 22, 23, 24, 28, 29, and 30. None of these districts generated an objection from the DOJ, and the plan received preclearance on November 18, 1991. Plaintiffs' Exhibit 76. With regard to districts 1, 2, 4, 5, and 8, Republican plaintiffs assert that minority communities were split to protect Anglo Democrat incumbents. Upon review of the population data for the counties that comprise these districts, and comparison of the population analysis reports ("PAR Reports") for HB 1 and the Republican proposed plans, this Court finds there are not a sufficient number of minorities in the counties comprising these districts to enable minorities to elect a candidate of their choice, that HB 1 does not regress the number of minorities in the districts as drawn, and that the Republican plan actually has fewer minorities in their proposed districts resulting in an average Anglo voting age percentage of 81.48% compared with an average of 80.36% in HB 1. *See* Plaintiff's Exhibits 77a-g, and Exhibits 85a-g. Similar claims were lodged against districts 13, 17, 19, 21, 23, and 28, though in this instance the Republican plaintiffs argued the districts as drawn in HB 1 were drawn as the result of political gerrymandering. This Court finds the plaintiffs have offered no sufficient evidence in support of their political gerrymandering argument pertaining to these districts, and that they likewise contain an insufficient number of minority residents to support a finding that the districts as drawn dilute minority voting strength.

As for districts 6, 9, 14, 22, 24, and 29, the Republican plaintiffs allege that districts 25 and 8 are regressed at the expense of creating district 29 as a Hispanic district, and that the other districts were drawn to dilute Re-

publican voting strength. Again, the plaintiffs have offered little evidence in support of their political gerrymandering claims. A comparison of the minority voting age populations of districts 25 and 8 also reveals that the number of minorities residing in the counties comprising each district is insufficient to elect a candidate of their choice, and that the number of minorities placed in those districts under HB 1 does not serve to dilute the minority voting strength in adjacent minority majority districts 18 (Black) and 20 (Hispanic). District 20 is a new Hispanic congressional seat in Harris County. The percentage of minority voting age populations for the plaintiffs' proposed versions of the two minority seats in Harris County are within a percentage point of those in HB 1. *See* Court's Exhibit 1; Plaintiff's Exhibits 77a-g, and Exhibits 85a-g.

Plaintiffs' remaining challenges to HB 1 involve a minority district encompassing the Dallas metropolitan area. District 30 in Dallas County is a new minority majority district drawn to elect a Black congressional candidate. While the 61.5% Black and Hispanic voting age population ("VAP") is commendable, the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandering district in the United States. Though this Court is concerned with the flagrant abandonment of compactness and preservation of communities of interest in this district, the Court further finds that a primary motive for any gerrymandering was to enhance Black voters' ability to elect a candidate of their choice. The mere fact that the Republican plaintiffs have fashioned a more compact District 30 with identical voting age population percentages, though more aesthetically pleasing, does not give rise to a finding of a Sec. 2 violation by this Court at this time. This Court further finds that District 30 as drawn in HB 1 does not dilute the minority vote in ad-

jacent districts, including Hispanics, as has been found in the House and Senate plans passed by the Legislature. For the reasons set forth in this section of the opinion, and the fact HB 1 has received preclearance from the DOJ, this Court finds plaintiffs' claims for preliminary relief fail to meet the standard for injunction to issue at this time, and that the 1992 primary elections for U.S. Congress may be conducted pursuant to HB 1.

B. *Texas Senate*

As discussed *supra*, there is presently no legally enacted state plan redistricting the Texas Senate that has received preclearance from the DOJ. Accordingly, this Court must scrutinize SB 31 for Sec. 2 and constitutional deficiencies as alleged in plaintiffs' complaint without the benefit of the DOJ's comments, if any, compiled during its 59 day review of that plan. Most of the issues raised in intervenors' complaints are either rendered moot by the Texas Supreme Court's December 17, 1991 opinion in *Quiroz*, or are not relevant to this Court's review of SB 31 at this time. This Court specifically finds that the *Quiroz* settlement plan is not valid under state law, but merely an alternative proposal submitted to the Court that because of the actions of the Secretary of State happened to receive favorable review by the DOJ.

Plaintiffs challenge the validity of Senate districts 1, 2, 3, 4, 9, 12, 15, 17, 19, 23, 26, and 31. With regard to District 15, this Court is persuaded by plaintiffs' claim that SB 31 does not create a credible Hispanic senate district in Harris County, but actually dilutes minority voting strength by placing 50.8% voting age Hispanics in that district as compared to the district 15 fashioned by this Court with 51.5% Hispanic voters. Plaintiffs argue that minorities which could have been placed in district 15 to make it a stronger minority majority district were splintered into district 11 to protect an Anglo incumbent. This Court's interim plan also increased the

Black VAP in District 15 from 14.9% to 15.9%, boosting the combined Black and Hispanic VAP in that district by almost 2%. Due to the configruration of Court district 15, the Cort's interim plan also increased the Black VAP of District 13 from 50.4 to 57.2%. The combined effect of the Court's interim Districts 15 and 13 significantly increases the voting strength of minorities in Harris County by ensuring that both a Black and Hispanic state senator will probably be elected from Harris County. This probability was not as great under SB 31.

Turning to North Texas and the Dallas-Fort Worth metropolitan area, plaintiffs challenge districts 2, 9, 12, and 23. Under SB 31, District 12 generally outlines the City of Forth Worth and contains 64.9% Anglo VAP, with approximately 18% Black VAP and 15% Hispanic VAP. This district is presently held by an Anglo incumbent. District 23 as drawn by SB 31 is promoted as a strong Black district that outlines the center of Dallas County, with 44.2% Black VAP, and a combined Black and Hispanic VAP of 67.7%. This Court's review of these districts and the voting tabulation districts ("VTD's") they are comprised of indicates that District 12 could be drawn as a strong minority impact district without diluting the Black voting population's chances of electing a state senator in District 23. District 12 as fashioned by this Court takes the Hispanic community concentrated in West Dallas and part of Irving and links it with the Black community in south central Tarrant County. The result is a district with a combined Black and Hispanic VAP of 48.5%. Under the Court's interim District 12, minority groups will have a significantly greater impact than in District 12 as drawn by SB 31. The Court's interim plan also increases the Black VAP in District 23 almost 2% to 45.6%, while the combined minority VAP remains strong at 64.4%. Black and Hispanic voters are thus provided a greater degree of participation in the political process than under SB 31.

In order to ensure that District 23 contained the requisite number of Black VAP, the Court's interim plan takes a number of VTD's from District 2, presently held by an Anglo incumbent, forcing District 2 to seek population elsewhere in order to keep its deviation at an acceptable level. The configuration of the Court's interim District 12 as a minority impact district also causes District 9 to be redrawn to include some of the population that SB 31 included in District 2 southeast of Dallas. Consequently, the addition of interim District 12 causes districts 1, 2, 3, 8, 9, 22, and 30 to be slightly adjusted. This Court's review of District 9 reveals SB 31 departed radically from the traditional configuration of that district. Because the Court's drawing of District 12 as a minority impact district makes the Legislature's version of District 9 impossible to reasonably approximate, the Court's plan largely restores that district to its traditional counties of composition, and has done so without unacceptably deviating from ideal population.

Plaintiffs' remaining challenges, and this Court's only other area of concern with SB 31, involve those districts drawn by the Legislature in South Texas and the Rio Grande Valley. All parties conceded at the December 13th hearing that SB 31 was perceived as "dead on arrival" at the Justice Department because the plan failed to create stronger Hispanic districts in Bexar County, or address the concerns of Hispanic voters in the districts running South to the U.S.-Mexican Border. SB 31 only creates four (4) districts in South Texas that would appear to ensure election of a Hispanic candidate in that area. This Court concurs with those concerns, finds SB 31 likely does not comply with the mandate of Sec. 2 and interpretive case law, and has fashioned interim districts in those areas that afford Hispanics six (6) state Senate seats in South and West Texas. This Court specifically finds that Districts 19 and 26 as drawn in SB 31 likely fail to meet the requirements of Sec. 2.

Under the Court's interim plan the Hispanic districts include numbers 19, 20, 21, 24, 27, and 29. These numbers correspond to SB 31's districts, 19, 20, 21, 25, 27, and 29 respectively. Under SB 31, District 25 is not a Hispanic district, yet this Court's interim District 21 approximates the same geographical area. The Court was able to craft its District 21 as an Hispanic district by absorbing part of SB 31's District 26, and allowing District 21 to extend further south by redrawing the three (3) districts running through the Rio Grande Valley.

Under SB 31, District 19, the Hispanic district wholly contained in Bexar county, offers 47.6% Hispanic VAP, with only 39.3% registered voters with Spanish surnames. This Court finds that District 19 as drawn in SB 31 likely fails to comply with Sec. 2's requirement that the minority group be able to elect a candidate of its choice, because the percentage of Hispanic voter turn out is too weak. This Court was able to fashion its interim District 19 to provide 56.2% Hispanic VAP, and 48.7% voters registered under a Spanish surname. District 20 in SB 31 boasts a 58.0% Hispanic VAP and accompanying 50.6% voters registered under Spanish surnames. This Court's interim District 20 almost mirrors those numbers, but it is drawn in such a way that Districts 24 and 21 may be drawn to create one district well above the deficient level provided in SB 31's District 26, and another district approximating the percentages in SB 31's District 21. For example, interim District 24 under the Court's plan contains 54.2% Hispanic VAP with a 48.0% voters registered under Spanish surnames. SB 31's District 26 contained only 51.4% Hispanic VAP, and a remarkably lower 42.7% voters registered under Spanish surnames. This Court notes that the overall percentages in its Hispanic districts are slightly stronger than those proposed in the *Quiroz* settlement plan that received preclearance by the DOJ.

Given the Court's substantial changes to the plans as drawn for South Texas, Dallas, and North Central Texas, unrelated districts are affected. In drawing the remainder of the State to accommodate the specific changes made by the Court plan, every attempt was made to place as many counties in the interim districts in the same numbered district as they would have been under SB 31. We consider ourselves to have been successful in this attempt, as fully half of the Senate Districts, namely those in West and East Texas, are substantially the same as under SB 31. The Court made every attempt to preserve the legislature's will in those areas of the state where no violations of the Voting Rights Act were found to occur.

C. *Texas House of Representatives*

On November 12, 1991 the DOJ issued its objections to HB 150 in a letter transmitted to the Texas Secretary of State. Noting the most significant demographic change in Texas in the past ten years to be the increase in Hispanic population, the DOJ's objections dealt wholly with the dilution of Hispanic voting strength in El Paso, Bexar, and Dallas Counties, and voiced concerns with districts in the Rio Grande Valley and South Texas. Upon review of the letter and the DOJ's findings, this Court finds considerable merit in the specific objections and has attempted to fashion a remedial plan yet remain loyal to those portions of the state in which no DOJ objections were lodged. This was accomplished to a much greater degree than the Court's interim Senate plan because most House districts changed fell within whole counties and did not effect other lines running through the rest of the state. Other than those areas of the state touched by the DOJ's objections, this Court finds plaintiffs challenge to HB 150 fail given the state of the evidence before the Court at the present time.

Though the DOJ's objection to Dallas County is far from clear, this Court's review of Districts 99 through

114 as drawn in H.B. 150 shows that Hispanic voters were fragmented into various districts completely diluting their ability to elect a candidate of their choice in *any* district in Dallas County. This Court further finds that the Hispanic population in Dallas County has grown significantly in the past ten years to the degree Hispanics as a voting group are capable of clearly electing a candidate of their choice in a minority majority Hispanic district, and participate significantly in the election of a candidate in an Hispanic impact district. This can be accomplished without diluting the ability of Black voters to elect at least four (4) candidates of their choice in Dallas County. In attempting to fashion such districts, this Court found its efforts remarkably paralleled those of the *Mena* plaintiffs' proposals, and therefore adopts that portion of their proposed redistricting plan that encompasses Dallas County. Under the Court approved interim plan, District 104 is a Hispanic district yielding 58.5% Hispanic VAP, while District 103 is a Hispanic impact district offering 41.3% Hispanic VAP, and a combined minority VAP of 53.4%. Districts 100, 109, 110, and 111 remain at percentages strong enough for Black voters in those areas to elect candidates of their choice.

H.B. 150 apportioned El Paso County into five districts. The DOJ objected to HB 150's reduction of Hispanic population in District 76, presently held by an Anglo incumbent. Though District 76 lies between two districts with Hispanic VAP in excess of 80%, the DOJ found the Hispanic voter registration was reduced by about four percentage points without an adequate justification. This was particularly objectionable in light of the DOJ's finding that Hispanic voter registration had increased in that district over the past ten years, inferring the reduction was intended to protect an Anglo incumbent. Under this Court's interim plan, Hispanic population flowed from Districts 75 and 77 in order to increase the percentage of Hispanic VAP in District 76 from 66.7% to 72.0%. Districts 75 and 77 were reduced

to Hispanic VAP's of 82.5% and 80.6% respectively. It is the opinion of this Court that the El Paso districts as drawn by the Court no longer dilute minority voting strength in District 26, and otherwise comply with Sec. 2.

The DOJ's objections to Bexar County focused on the apparent regression of Hispanic voting strength in District 117 resulting from the packing of Hispanics in District 118. While the DOJ did not object to the number of Hispanic seats drawn in H.B. 150 in Bexar County, which numbered five (5) with Hispanic VAP above 55%, this Court finds that an interim plan can and should be drawn to provide Hispanics seven (7) districts with Hispanic VAP above 55%. This Court further finds District 117 as drawn under HB 150 is not an Hisapnic seat as the Hispanic VAP is well under 55%. This Court's interim plan for Bexar County essentially mirrors the proposals offered by the *Mena* plaintiffs. Their proposals had been submitted to the DOJ in an attempt to obtain withdrawal of the Department's objections.

Objections were also made to the districts drawn in H.B. 150 located south and southwest of Bexar County, and north of Cameron and Hidalgo counties. The Legislature drew distinct lines 43 and 44 in an east-west manner that had the effect of packing Hispanics in the southern districts and overpopulating Anglos in the northern districts. The DOJ noted that this problem would have been alleviated had the districts been drawn in a north-south configuration, and that an additional Hispanic district could have been created. This east-west configuration was viewed by the DOJ as intended to protect an Anglo incumbent. Under H.B. 150, the Hispanic VAP of District 43 is 75.0% while the VAP of District 44 is only 46.9%. These districts as drawn by the Court maintain District 43 at 66% Hispanic VAP, while increasing the Hispanic VAP in District 44 to 54.5%, and remedy the problems identified by the DOJ.

Finally, this Court concurs with the DOJ's objections to the reduction of Hispanic VAP in District 38 to protect an Anglo incumbent. This Court's interim plan moved Hispanics from District 36 into District 38, increasing the Hispanic VAP from 67.6% to 72.9%, while maintaining the Hispanic VAP in District 36 at 74.4%. In order to arrive at an acceptable deviation level, the Court also moved a small number of Anglo voters from District 38 into District 37. This change had no appreciable effect on the Hispanic VAP in District 37.

IV. JUDGMENT

It is the intention of this Court by this Opinion and Judgment to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law, and by this Opinion and Judgment to provide for the holding of elections in Texas without delay and in accordance with existing state law. In developing equitable interim state legislative redistricting plans the Court has sought primarily to provide new or improved state House and Senate districts that provide a realistic opportunity for the election of racial and ethnic minority candidates. Any partisan effects resulting from this effort are apparently a natural and unavoidable consequence of the Court's emphasis on the interests of long-neglected minority concerns.

This Court has sought diligently, where appropriate, to adhere to the legitimate districting intent of the state legislature and, where federal constitutional and statutory prohibitions are not offended, to give effect to the will of that body. A conscientious inquiry, however, reveals even to the most casual political historian the long history of federal court intervention in Texas redistricting schemes in order to provide minimal protection to the electoral interests of racial and ethnic minorities. While past state legislatures have paid some tribute to

these important interests, partisan concerns and preservation of incumbents appear paramount on the decennial legislative agenda. The time-honored effects of adherence to these more parochial concerns have sometimes been an unspoken disservice to minority representation.

As the Regular Session of the 72nd Legislature concluded with the approval of H.B. 150 and S.B. 31, those state officials charged with presenting these legislatively-approved plans to the Department of Justice for required Voting Rights Act preclearance seemed unusually lethargic. This inaction is a central reason for the need of federal judicial action at this time in an effort to protect minorities' constitutional and statutory voting rights.

The legislative history of H.B. 150 and S.B. 31, coupled with the leisurely presentation to the Justice Department provides this Court with no real hope that further deference to the legislature at this time would yield any result other than continued protection of some members' self-interests to the exclusion of minorities' rights. For the interim, this Court will exercise its constitutional responsibilities to provide protection to this latter group of often-neglected Texas citizens. Based on the findings and legal conclusions set forth in this Opinion it is the Judgment of this Court that the 1992 primary elections proceed as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-428 is DENIED, and that elections should proceed on an interim basis under the congressional plan as drawn in HB 1;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-426 is GRANTED, and that primary elections for the Texas Senate will be conducted under this Court's interim plan attached as Appendix A to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-425 is GRANTED, and that primary elections for the Texas House of Representatives be conducted under this Court's interim plan attached as Appendix B to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the candidate filing deadlines for the 1992 primary elections are extended to January 10, 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residency requirement for candidates to the Texas Senate, and Texas House of Representatives are hereby waived for elections held under the State House and State Senate interim plans in 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Joint Motion for Interim Relief filed in all three causes December 6, 1991 is GRANTED, and that election precincts may be consolidated as contemplated in those motions.

SIGNED AND ENTERED this 24th day of December, 1991.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

Garwood, Circuit Judge, dissenting in part:

I join the majority's judgment and its essential reasoning in all respects except as follows:

In light of the fact that the Texas legislature has recently been called into special session commencing January 2, 1992, for the purpose of redistricting, in my view this Court's Order should expressly provide that in the event legislation is enacted effecting alternate redistricting, and/or postponement of the 1992 primary elections, and such legislation is precleared by the Department of Justice, and found not invalid by this or another court if challenged, and all this transpires in time such that review thereof by the Department of Justice and by this Court can be had and thereafter the presently scheduled 1992 primary elections, or 1992 primary elections pursuant to any such postponed date (if any such postponement is timely precleared by the Department of Justice and not sooner found invalid by this or another court), may properly take place in 1992, then the interim plan adopted by this Court shall be of no force or effect as to the body or bodies so redistricted. I believe that this much is required by deference to the legislature in these matters. *See, e.g., McDaniel v. Sanchez*, 101 S.Ct. 2224, 2236 n.30 (1981).

SIGNED AND ENTERED this 24th day of December, 1991.

/s/ Will Garwood
WILL GARWOOD
United States Circuit Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

[Filed Mar. 31, 1992]

Having been advised by the office of the Secretary of the State of Ohio that the date of June 2, 1992 for the primary election for the purpose of selecting candidates for membership in the General Assembly of Ohio to be voted upon at the General Election to be held November 3, 1992 as directed by order entered herein March 10, 1992 cannot be met and must be vacated, said primary election is hereby rescheduled to be held September 8, 1992. It is further ordered that the Secretary of the State of Ohio be and he hereby is enjoined to do all such acts as may be necessary for the holding of such primary election September 8, 1992.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
Circuit Judge

/s/ John W. Peck
JOHN W. PECK
Senior Circuit Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

NOTICE OF APPEAL

[Filed Apr. 1, 1992]

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Order of March 31, 1992. This appeal is taken pursuant to 28 U.S.C., §1253, and is in addition to the previous Notices of Appeal filed March 11, 1992 and March 25, 1992 from the three-judge district court's Orders of March 10, 1992 and March 19, 1992, respectively.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

CERTIFICATE OF SERVICE

[Filed Apr. 1, 1992]

The undersigned hereby certifies that a true and correct copy of the Notice of Appeal in this case has been served by first-class United States mail service, postage prepaid, this 1st day of April, 1992, upon the following Counsel of Record in this case.

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